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For participants only

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Held at the Palais des Nations, Geneva, on Wednesday, 18 July 2018, at 10 a.m.

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Present:

Chairman:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report on succession of States in respect of State responsibility (A/CN.4/719).

Mr. Murase, after thanking the Special Rapporteur for his excellent second report, said that he first of all wished to make some general comments.

He had initially expressed scepticism about the Commission taking up the topic because he feared that it might simply end up copying and pasting the resolution on succession of States in matters of international responsibility adopted by the Institute of International Law in 2015 into its own work. He had to say that he remained sceptical.

He acknowledged that the second report took a different approach to that of the resolution of the Institute of International Law in addressing the transfer of rights and obligations arising from internationally wrongful acts. In the Institute of International Law resolution, articles 12 to 16, on the exceptions to the general rule of non-succession, addressed both the rights and the obligations arising from internationally wrongful acts of predecessor or successor States. The Special Rapporteur, on the other hand, limited the scope of the second report to issues related to the transfer of the "obligations arising from an internationally wrongful act of the predecessor State", while the third report, to be submitted in 2019, would in turn focus on "the transfer of the rights or claims of an injured predecessor State to the successor State". However, the Special Rapporteur did not explain, either in paragraph 21 of the report or elsewhere, why he had chosen that approach. It might have been to reflect the distinction made in the Commission's 2001 articles on responsibility of States for internationally wrongful acts between Part Two, which addressed obligations as legal consequences arising from the internationally wrongful act, and Part Three, which dealt with the rights related to the invocation of State responsibility.

It would be appreciated if the Special Rapporteur could clarify his reasons for, and the advantages of, taking an approach that differed from that of the Institute of International Law by separating rights and obligations. Admittedly, his approach might be supported if account were taken of the background against which Part One and Part Two of the 2001 articles had been artificially separated in order to differentiate between the rights of an injured State, in article 42, and those of a State other than an injured State, in article 48. However, like Mr. Park, he feared that such an approach might lead to some duplication, given that many of the exceptions to the general rule of non-succession were equally applicable to rights and to obligations as, for instance, where there was a direct link between the internationally wrongful act and the territory of the successor State. It might, after all, be better to follow the approach of the Institute in order to economize efforts and develop simpler draft articles.

Even if the Special Rapporteur's approach of separating rights and obligations was considered appropriate, the scope of obligations and rights in the proposed draft articles appeared to be too narrow. Draft article 6, which reflected the general rule of non-succession, confined its scope to invoking "the responsibility of the predecessor State" and claiming from it "a reparation for the damage caused by such internationally wrongful act". That limitation to "reparation" could be problematic, as it included only reparation and excluded cessation and non-repetition and legal consequences for serious breaches of *jus cogens*. The draft article also provided for the right of an injured State but excluded the right of a State other than an injured State and the issue of countermeasures, although the latter was to be addressed in the third report. In order to comprehensively address all possible cases, the current approach should be refined in line with the 2001 articles on responsibility of States for internationally wrongful acts and the 2015 resolution of the Institute of International Law.

Furthermore, it was curious that the Special Rapporteur had opted not to address a direct link between the act and the population as part of the exceptions to the general rule of non-succession. The report's territory-focused approach differed from that of the Institute of International Law resolution, which covered situations where there was a direct link

between the consequences of internationally wrongful acts and both the territory and the population in question. In the resolution, the link with the population appeared in each exception to the general rule of non-succession and was particularly pertinent in the case of "newly independent States". Article 16 (4) of the resolution clearly acknowledged "the rights arising from an internationally wrongful act ... against a people entitled to self-determination". The Special Rapporteur had perhaps omitted the population link because he believed it was relevant only to the succession to rights; however, there might be situations where succession to obligations also resulted from a direct link between the act and the population as, for example, where the population of the successor State had been unjustly enriched by the internationally wrongful conduct of the predecessor State.

Moreover, a unilateral undertaking by a successor State to succeed to obligations arising from a wrongful act was not itself sufficient for succession to occur. He believed that the other party to the responsibility relationship — the injured State or another victim subject — must also accept the undertaking. The final report of the Institute of International Law on State succession in matters of State responsibility stated that "the victim must have the possibility to express its view on the question of the holder of the obligation in its favour". It might therefore be pertinent to consider including in the draft articles the requirement that the consent of the injured subject to any agreement made among predecessor and successor States on the apportionment of obligations should be obtained. Consideration could also be given to a savings clause referring to the *pacta tertiis* rule that any agreement on succession to obligations must not affect the rights of an injured third party to invoke responsibility.

Turning to the specific draft articles proposed in the report, he said that he had seven points to make.

First, draft article 6 (1) could be made more specific. As it stood, the paragraph read: "Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States." While he agreed with the substance of the paragraph, he felt that the following wording would be clearer and more straightforward: "State responsibility for an internationally wrongful act committed before the date of succession of States is attributable to the predecessor State."

Second, with regard to draft article 7 (3), it might be necessary to refer to how the predecessor and successor States should apportion rights and obligations after separation. Inspiration could be drawn from article 7 (2) of the Institute of International Law resolution, which read "in order to determine an equitable apportionment of the rights or obligations of the successor States, criteria that may be taken into consideration include the existence of any special connections with the act giving rise to international responsibility, the size of the territory and of the population, the respective contributions to the gross domestic product of the States concerned at the date of succession, the need to avoid unjust enrichment and any other circumstance relevant to the case". He agreed with the Special Rapporteur that unjust enrichment was one of the circumstances justifying the deviation from the general rule of non-succession, but was uncertain as to why it was not included in the draft articles. Furthermore, the successor State would necessarily take a position with regard to the wrongful act after the date of the State succession, a point on which the Commission should perhaps go further than the Institute of International Law had, by including the question of whether the successor State dissociated itself from the wrongful act as a factor to be taken into account in apportioning obligations after secession.

Third, with regard to draft articles 7 and 8, he wondered whether the Commission should also include a reference to the need for the predecessor and successor States to negotiate in good faith with a view to reaching agreement within a reasonable period of time. That was particularly pertinent in respect of draft article 8, where the newly independent State's agreement was central to the succession to obligations. The need to negotiate in good faith within a reasonable period of time was important in ensuring that the avenue of redress for injured third parties was not held in abeyance because of State succession.

Fourth, in draft article 7 (4), the effect of the current wording, "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the

territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law", could be made absolutely clear by adding a second sentence at the end of the paragraph to read: "Consequently, the predecessor State incurs no responsibility for the acts committed by the insurrectional or other movement." The same comment applied to draft article 8 (3), relating to national liberation or other movements.

Fifth, with regard to draft article 8, he agreed that there should be no succession to obligations unless the newly independent State agreed. It might be preferable, in the first sentence of paragraph 2 of draft article 8, to include the word "expressly" before "agrees". The second sentence of the paragraph could perhaps also be refined to clarify whether or not the "particular circumstances" constituted an exception to the newly independent States' ability to accept or reject responsibility. The current wording suggested that particular circumstances should be taken into consideration where there was a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy. It was unclear to what extent successor States were required to take those circumstances into account in deciding whether or not to assume obligations. If they were required to do so, the circumstances would essentially constitute an exception to the non-succession rule in cases of newly independent States. The draft article could benefit from further clarification.

Sixth, he agreed that acts committed by an autonomous entity of the predecessor State should be accepted as one of the elements in support of succession to responsibility. He noted that one of the circumstances mentioned in draft article 8 (2) that should be taken into account was whether the former territory had substantive autonomy, but no reference was made to substantive autonomy in draft articles 7 or 9. Draft article 7 stated that responsibility passed along with seceded territory if the act was carried out by an organ of a territorial unit of the predecessor State that had later become an organ of the successor State. The Special Rapporteur probably presumed that those State organs had substantive autonomy, because in paragraph 97 of the report he acknowledged the need for a clear devolution of powers to local authorities in order for there to be succession to responsibility. It might be useful to refer expressly to substantive autonomy when mentioning State organs that became organs of the successor State, rather than simply presuming that they were autonomous at the time of the act. In fact, if substantive autonomy were to be presumed on the part of any territory, it should be presumed in cases of newly independent States, because a newly independent State was often a former colony or protectorate with substantive autonomy over domestic issues. The same presumption could not be made in cases of separation and transfer of territory, where it was more likely that the State organs and territorial units in question had had little or no autonomy at the time of the act. Accordingly, if it was necessary to refer to substantive autonomy in draft article 8, which dealt with newly independent States, then it was even more pertinent to refer to it in draft articles 7 and 9, which addressed separation and transfer of territory. There was clearly no need to refer to substantive autonomy when dealing with movements which had successfully established a new State, because it was fairly obvious that such movements were autonomous.

Seventh, with regard to draft article 11, instead of merely stipulating that the obligations passed to successor States in the event of dissolution, he wondered whether it might be specified that they must pass equitably, as was stated in article 7 (1) of the Institute of International Law resolution. It was true that, in respect of predecessor States which no longer existed, the presumption was one of succession rather than one of non-succession. But, as the Special Rapporteur had rightly pointed out in his oral introduction, the direct link between the act and the territory or population and the evolution of an organ of a predecessor State into an organ of the successor State were still relevant insofar as they made it possible to ascertain how obligations should be apportioned amongst successor States. As he had stated earlier, inspiration could be drawn from the Institute of International Law resolution in respect of the circumstances to be considered when determining the equitable apportionment of obligations. Furthermore, in draft article 11 (2), for the sake of accuracy, the phrase "in order to settle the consequences of the internationally wrongful act of the predecessor State" should be replaced with "in order to

apportion the obligations arising from the internationally wrongful act of the predecessor State".

In conclusion, he was in favour of sending all the draft articles to the Drafting Committee.

Mr. Murphy said that the report was very interesting and well researched, and covered in some depth the Commission's work on prior succession projects, State practice in relation to succession and State responsibility, and the limited jurisprudence in the area. He found it especially helpful that the analysis was closely tied to the proposed draft articles, as it showed how the related commentary might unfold.

While in the first report the Special Rapporteur had contemplated a general rule of succession of State responsibility with exceptions, in the second report he was now firmly in the camp of those who saw a rule of non-succession of State responsibility when the predecessor State continued to exist, but with exceptions or special rules in some instances. That position was consistent with the views expressed by a "number of delegations" in the Sixth Committee that "considered that the principle of non-succession regarding State responsibility reflected the current law on the matter"; those States included Austria, Iran, Japan, the Russia and Viet Nam. Several other States, including Belarus, Croatia, the Czech Republic and Slovenia, had been "inclined to support the preliminary conclusion of the Special Rapporteur that the 'traditional' theory of non-succession had recently been challenged". He considered the Special Rapporteur's current position to be correct, based on the State practice reviewed in the report.

Turning to the proposed draft articles, he said that draft article 5 basically stated that the rules set forth in the draft articles applied only when a succession of States occurred in accordance with international law. As indicated in the report, that draft article mirrored the approach taken in the Vienna Convention on Succession of States in Respect of Treaties, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and the Commission's articles on nationality of natural persons in relation to the succession of States. Like Mr. Park and Sir Michael Wood, he supported proposed draft article 5 and assumed that, if adopted, it would in due course become draft article 3, placed after draft article 1 on scope and draft article 2 on the use of terms.

Draft article 6 purported to set forth a general rule but it was not entirely clear exactly what the "general rule" was. Paragraph 1 asserted one type of rule, while paragraph 2 asserted a different rule. Paragraph 3 then began by referring to "this rule", which appeared to be a reference to the rule set forth in paragraph 2, but it was not absolutely clear if that was indeed the case. In any event, his sense was that only paragraph 1 actually reflected a rule relevant to all cases of State succession, as paragraphs 2 to 4 related solely to situations of succession where a predecessor State continued to exist, not to all cases of State succession. If draft article 6 as a whole was intended to be a "general rule" or, more accurately, "general rules", then it should presumably be supplemented so as to address directly the question of what rule applied when a predecessor State did not continue to exist. Under the current proposals, it appeared that the general rule being advocated was that, where the predecessor State did not continue to exist, obligations arising from an internationally wrongful act of any predecessor State passed to the successor State, subject to certain conditions, which were later identified in draft articles 10 and 11. If draft article 6 were to remain as a "general rules" article, then perhaps a paragraph along those lines should be added to it.

However, given that it might be difficult to identify a general rule or rules that applied to all types of succession, an alternative approach might be considered. Draft article 6 (1) could be separated as a stand-alone draft article so as to apply to all situations of State succession, regardless of how that succession unfolded or whether the situation at hand concerned the rights or claims of a predecessor State or a successor State. Such a stand-alone draft article might be entitled "Effect of succession of States on attribution of responsibility".

Draft article 6 (2) to (4), and draft articles 7 to 9 could then be grouped together, as relating solely to the situation where a predecessor State continued to exist. Within that grouping draft article 6 (2) to (4) would focus on the consequences for the State

responsibility of the predecessor State, while draft articles 7 to 9 would address the consequences for the State responsibility of the successor State arising from three scenarios, namely separation, newly independent States and cession.

Under that alternative approach, the Special Rapporteur might contemplate proposing titles for different "parts" of the draft articles. Part One could be entitled "General provisions" and include the draft articles on scope and use of terms, draft article 5 and draft article 6 (1) as a stand-alone article. Part Two could be entitled "Cases of succession where a predecessor State continues to exist" and include the remainder of draft article 6 and draft articles 7 to 9. Part Three could be entitled "Cases of succession where no predecessor State continues to exist" and consist of draft articles 10 and 11.

The content of draft articles 7, 8 and 9 essentially indicated that the obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State under each of the three scenarios, but that for each scenario there were certain exceptions or special rules. He had no particular suggestions in respect of the content of the three draft principles, other than to note the malleability or vagueness of the exceptions that resulted from the opening clause "if particular circumstances so require". Further, there was also some repetition, which could be avoided by combining the three draft articles into a single draft article. However, he recognized the value in locating the three scenarios in separate draft articles, with associated commentary.

That said, improvements could be made in the Drafting Committee. For example, if there were a draft article on "newly independent States", then the term should be defined in draft article 2, as the Special Rapporteur suggested in paragraph 125 of the report. That could be done in a manner consistent with the two Vienna Conventions on succession of States and with any issue concerning international protectorates addressed in the commentary.

Unlike draft articles 6 to 9, draft articles 10 and 11 concerned situations where the predecessor State did not continue to exist, specifically when two States united or a State dissolved. The Special Rapporteur suggested, in paragraph 148 of his report, that in those situations there was a "presumption of succession in respect of obligations arising from State responsibility". Like Mr. Park, he was unsure if State practice was sufficient to justify that position. He shared Sir Michael Wood's view that such presumption seemed grounded more in a policy preference than in settled law.

In any event, again, improvements might be considered in the Drafting Committee. For example, while he understood that paragraph 1 of draft article 10 dealt with one type of unification, such as, perhaps, the formation of the United Arab Republic, and paragraph 2 dealt with a different type of unification, such as perhaps the absorption of the German Democratic Republic into the Federal Republic of Germany, consideration might be given to combining the two paragraphs, so as to read: "When a new successor State is formed through the uniting of States, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State." The two situations for unification could then be addressed in the commentary. One advantage of that approach would be that the Commission could avoid declaring particular incidents as squarely falling within one or the other of the two paragraphs. He had in mind Mr. Nguyen's point about the differing views as to the unification of Viet Nam.

In draft article 11, the drafting could be improved to clarify who was entering into an agreement with whom in paragraph 1, and whether the negotiations in paragraph 2 were with the same or different actors. Depending on what was meant, consideration might be given to adding at the beginning of paragraph 2 the phrase "In the absence of such an agreement,".

He had no objection to the Special Rapporteur's plans for future work as described in paragraphs 191 and 192 of the second report.

In conclusion, he recommended the referral of all of the proposed draft articles to the Drafting Committee.

Mr. Reinisch said that he would like to express his appreciation to the Special Rapporteur for his very detailed second report.

In 2017, the Commission had had the opportunity to discuss the Special Rapporteur's general approach to the topic, encapsulated in the "argument that the responsibility of a State might be engaged by way of succession". That alleged new "trend" had been questioned by some members of the Commission. It seemed that the generally accepted premise in international law that State responsibility was incurred by a State for wrongful acts that could be attributed to that State entailed the logical consequence that only the State committing an internationally wrongful act could become responsible for it, excluding any automatic transfer of responsibility to a successor State.

It was indeed with great satisfaction that he read in the second report that the Special Rapporteur clearly emphasized the basic rule of State responsibility expressed in article 1 of the articles on responsibility of States for internationally wrongful acts, namely that "every internationally wrongful act of a State entails the international responsibility of that State". Thus, the Special Rapporteur concluded correctly that it was "evident that *both* the act (conduct) that constitutes a breach and the international obligation breached must therefore refer to *that* State only, and not to any other State, including predecessor or successor States".

Against that background, he welcomed the Special Rapporteur's announcement in paragraph 16 of his second report that he was not suggesting "replacing one highly general theory of non-succession by another similar theory in favour of succession" and that instead "a more flexible and realistic approach is needed".

However, he feared that it was just such a replacement that he saw in the remainder of the report and, even worse, in some of the proposed draft articles, in particular, draft articles 10 and 11, which — miraculously — arrived at a general rule in favour of automatic succession. For instance, draft article 10 stated unequivocally that "when two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State".

Before discussing those draft articles in more detail, he wished to comment on the report and address the proposed draft articles in sequence.

Draft article 5 provided that "the present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations", following the lead taken by the two Vienna Conventions on succession of States. While understandable, such a provision probably raised more questions than it could solve. Did it suggest that in cases of unlawful succession, such as — to follow the example given by the Special Rapporteur in his second report — the unilateral declaration of independence of Southern Rhodesia, the proposed draft articles should not apply, with the implication that the special rules providing for an exceptional succession to responsibility in paragraphs 2 and 4 of draft article 7 did not apply, thereby privileging the unlawful successor State by exempting it from responsibility? Or would those rules rather apply *per analogiam* anyway? If the latter were the case, one might wonder whether it made sense to restrict the application of the draft articles to lawful successions only.

With regard to draft article 6, he had already expressed his agreement with the general principle contained in paragraph 1, namely that "succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States". Indeed, that wording appeared to be an expression of a general principle of law that responsibility for wrongful acts was based on the attribution of such acts to a subject of law. That was true for tort law as well as criminal law; it went back to the Roman *lex Aquilia* and could be found in all modern systems of law — it was the actor who committed a wrongful or even criminal act who would be made accountable. At the same time, it was also clear that such accountability or responsibility would not accrue to the legal successors of the wrongdoer.

Those thoughts were adequately reflected in the two following paragraphs of draft article 6. Paragraph 2 clarified that a change in territory as a result of a partial succession, for example through secession or incorporation, did not affect the existence of a State or the continuing responsibility of the State for its wrongful acts. Paragraph 3 of draft article 6 was also based on firm ground insofar as it stated that a successor State that continued a

wrongful act started by its predecessor might incur its "own" responsibility if that continuation offered a basis of attribution.

Where the problem really began was with the innocuous statement contained in paragraph 4 of draft article 6, which affirmed that "notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles". While carefully formulated in terms of a right to "claim reparation for the damage caused by an internationally wrongful act of the predecessor State" instead of attribution of wrongfulness, it still signalled that the general principle that responsibility for a wrongful act might accrue only to the subject committing such an act was being discarded and that the consequences of a wrongful act, in particular the obligation to make reparation, could be transferred. Thus, the paradigm shift that the Special Rapporteur had disavowed in paragraph 16 of his report, where he said that he did "not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession", was in fact announced.

He was using the word "announced" because the following draft articles continued on rather safe ground. Draft articles 7, 8 and 9 addressed situations where the predecessor State continued to exist and where thus the general principle of responsibility accruing to the State which had committed an unlawful act would apply.

Draft article 7, dealing with separation of parts of a State, restated in its first paragraph the generally accepted rule that "the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State". What the Special Rapporteur characterized as "exceptions" seemed in paragraphs 2 and 3 to be modelled along the lines of the traditional rules of State responsibility, according to which the acts of a successful insurrectional movement might be attributed to the newly formed State even if those acts had been committed before its formal existence. The latter rule was contained in paragraph 4 of draft article 7.

He found also that the Special Rapporteur had a point in arguing that a similar rule should also apply to acts committed by an autonomous entity of a predecessor State. He thus had some sympathy for the idea of stipulating, as the Special Rapporteur did in paragraph 2 of draft article 7, that "if particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State". He was concerned, however, that the limited practice might cast doubt on whether the formulation "the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State" was justified in that case.

He had even more difficulty with paragraph 3 of draft article 7, which provided that the obligations arising from an internationally wrongful act of the predecessor State might be assumed where there was a direct link between the act or its consequences and the territory of the successor State or States. That was a highly indeterminate provision which posed more problems than it solved. Did it purport not to contain a rule of transfer of obligations as contained in paragraph 2, by merely stating that obligations "are assumed" instead of indicating they "will transfer"? What were "direct links" between a wrongful act or its consequences and the territory of the successor State or States? Was that a reference to the unjust enrichment concept sometimes advanced in favour of establishing a rule of succession to State responsibility? The text of that paragraph was highly ambiguous, enigmatic and thus rather impractical.

The report was not very helpful in clarifying the matter. It discussed, in paragraphs 98 to 103, the "link between internationally wrongful act and territory". But it again rather cryptically stated that the "question is neither of the size of a separated territory, nor the fact that the act was perpetrated on the territory of a new State, but more a question of the linkage between the internationally wrongful acts and the territory in question". While acknowledging that there was not really any relevant State practice in that regard, the report considered as "one relevant example of practice" the secession of Belgium from the Kingdom of the Netherlands in 1830, when France, Great Britain, Prussia and the United

States had made a joint application to Belgium —the successor State — requesting compensation from it "solely upon the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted". The puzzled reader was left to ponder what to make of the criterion of "a direct link between the act or its consequences and the territory of the successor State or States" when he or she had been told that the fact of the acts' commission on the territory of what became a successor State was not relevant, while the single relevant practice cited seemed to point exactly to that fact.

It was therefore even more surprising that, while discussing the potential relevance of the principle of unjust enrichment in paragraphs 104 to 106 of his report, the Special Rapporteur did not recur to it as providing the "missing link" between an act and the territory of a successor. While it was certainly correct that unjust enrichment considerations were relevant mostly in the context of succession to State debts, it appeared that they could equally be relevant in order to ascertain a potential link between an unlawful act and the territory of a successor State.

On that basis, he would like to suggest the deletion of paragraph 3 of draft article 7 because of its imprecise and rather unworkable nature.

With respect to the issue of "newly independent States" addressed in draft article 8, the Special Rapporteur noted in paragraph 124 of his report that there was indeed a "question whether the approach, which was justified for codification influenced by the context of decolonization, is still relevant to the present context". In fact, the Commission had already posed that question almost thirty years earlier. In addition, a Tanzanian participant in the United Nations Conference on Succession of States in Respect of Treaties held in Vienna in 1978 had questioned whether the Convention had not "come too late to regulate what is already a *fait accompli* [...] when most of the decolonizing process is over."

He expressed doubt as to whether it was a good idea to retain the category of newly independent States in the present topic, not least considering the fact that the more recent work of the Commission on the nationality of natural persons in relation to succession had already abandoned the category. He noted that the resolution of the Institute of International Law, from which the Special Rapporteur had taken much inspiration, retained the concept of "newly independent States", but he also noted that that had been criticized within the Institute.

As was well known, the special regime foreseen in the two Vienna Conventions on succession of States was often regarded as having contributed to its lack of success in terms of ratifications and accessions. It had sharply divided the Commission and States.

The content of draft article 8 largely mirrored what was provided for "non-newly independent" successor States. Paragraph 1 reiterated the general rule of non-succession. The first sentence of paragraph 2 illustrated what was evidently considered "the principle that a successor State is always free to agree to accept the obligations arising from internationally wrongful acts committed by the predecessor State". Although it was not entirely clear how the second sentence of paragraph 2, particularly the phrase "may be taken into consideration", modified the meaning of the first sentence, presumably that paragraph too, in its essence, stated that consent might override the general rule of non-succession in terms of responsibility. Paragraph 3 of draft article 8 reflected the content of paragraph 4 of draft article 7, itself modelled after article 10 (2) of the articles on responsibility of States for internationally wrongful acts, which, however, referred to the wider category of "a movement, insurrectional or other". In his view, there was no need to limit the reiteration of that principle to the context of a "national liberation movement". Overall, it was thus unclear whether the content of draft article 8 substantively differed from the remaining provisions of the draft articles under consideration.

As a result, he proposed that draft article 8 and thus reference to "newly independent States" should be omitted for four reasons. First, because the distinction related to a phenomenon of the past; second, because it had contributed to the limited acceptance of the previous work of the Commission; third, because it had been a source of disagreement among States; and fourth, because the draft articles under consideration did not contain significant substantive distinctions on that basis in any event.

Since draft article 9, dealing with transfers of part of a territory in cases of cession, largely followed the provisions of draft article 7, his earlier comments on that article applied also largely *mutatis mutandis*.

Turning to the most problematic part of the report and the ensuing proposed draft articles, he noted that in draft articles 10 and 11 the Special Rapporteur purported to have identified rules of succession to obligations resulting from State responsibility where the predecessor State or States ceased to exist.

Different from the cases of secession or cession, draft articles 10 and 11 stipulated that in cases of unification, dissolution or incorporation the obligations stemming from the wrongful acts of predecessor States generally passed to their successor States. In fact, the formulation of the respective draft articles, such as draft article 10 (1) and draft article 11 (1), went far beyond what the report more modestly proposed in paragraph 148, where the Special Rapporteur said that "the general rule of non-succession should be replaced rather by a presumption of succession in respect of obligations arising from State responsibility".

Draft article 10 (1) unequivocally stated that "when two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State". Draft article 11 (1) stated that "when a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States". He noted that the latter formulation could be read to mean that a succession occurred only subject to an agreement by the successor State or States; however, he was concerned about the Special Rapporteur's comment in paragraph 189 of the report, where he said that "a transfer of obligations may take place according to or in the absence of an agreement. At the very least, the successor States have to negotiate among themselves and with the injured State in good faith". That could mean that only the precise allocation or share of responsibility was subject to an agreement, whereas in principle obligations passed automatically just as they did in the other case where no predecessor State survived, *i.e.* the case of a merger of States as contained in draft article 10. While the second report repeatedly asserted that that would reflect a modern trend, it was more than reluctant to provide actual instances of State practice that would support the claim that successor States actually succeeded to the consequences of responsibility.

What was particularly telling was that practically all the examples mentioned by the Special Rapporteur in paragraphs 153 to 155, 169 and 170 of the second report to support the alleged rule of succession to State responsibility were taken from the field of expropriation. While uncompensated expropriation might indeed constitute a wrongful act, it was also clear that the act of expropriation as such was not illegal in international law. That was a firmly established rule in customary international law and was abundantly repeated in various international investment agreements that did not prohibit expropriation, but rather made the lawfulness of expropriations dependent, among others, upon the payment of some form of compensation.

Thus, the payment of such compensation could be seen as the discharge of a debt. Therefore, the practice referred to in the second report whereby successor States had agreed to pay compensation for property taken by their predecessors could also be regarded as indicating that States lived up to their obligations to pay the debts incurred by the predecessor States that had expropriated foreign assets, which, as such, was not unlawful.

That practice also served as a strong reminder of the unjust enrichment paradigm underlying the obligation to pay compensation in case of expropriation. While States were free to exercise their right of "eminent domain", or however the right to expropriate even foreign assets might be termed, they could do so lawfully only under the condition that they made "adequate" or "appropriate" compensation. That condition safeguarded against an unjust enrichment of the expropriating State. Thus, the examples mentioned in the second report might be useful for the unjust enrichment rationale sometimes discussed in the context of potential demands of succession in respect of obligations deriving from State responsibility. However, they could hardly be used as forms of State practice confirming a

rule of succession to the obligation to make reparation for wrongful acts of a predecessor State.

The true rationale for the purported rules of succession contained in draft articles 10 and 11 could rather be found in paragraphs 147 and 167 of the report. In paragraph 147, the Special Rapporteur argued that the application of the general rule of non-succession to cases in which the predecessor State ceased to exist would mean that no State incurred obligations arising from internationally wrongful acts, and that such a solution would hardly be compatible with the objectives of international law, which included equitable and reasonable settlement of disputes. Such a justification constituted a *non sequitur*. The principle of peaceful — as well as equitable and reasonable — settlement of disputes was intended to dissuade States from taking the law into their own hands and, as provided for in Article 33 of the Charter of the United Nations, required that disputes should be settled by pacific means. However, an obligation to settle disputes did not guarantee any particular outcome. Whether a State was responsible for wrongful acts depended on the applicable rules of State responsibility and the primary rules of international law that might have been violated. It could even stem from a rule of State succession, if such a rule could be established, but it was not possible to infer such a rule from a duty to settle disputes.

In paragraph 167 of the report, rather than grounding the principle of succession to obligations arising from internationally wrongful acts in State practice or *opinio juris*, the Special Rapporteur based his interpretation on one voice of legal scholarship which deplored the idea that in a situation where a responsible actor disappeared no one could be made responsible. While the desire that someone should always be held responsible for a wrongful act was understandable, such a wish did not make a rule of law, either *lex lata* or *de lege ferenda*, just and equitable. And although the Special Rapporteur's interpretation might reflect the view of claimants, it might not reflect that of successor States, who might claim that they should not be held accountable for the wrongdoings of their predecessor States. Such an interpretation was indeed highly questionable from a doctrinal point of view, since it implied a State's responsibility for unlawful acts committed by another subject of law without any unlawfulness attributable to the successor State.

The purported rules proposed in draft articles 10 and 11 were all the more unjust and inequitable as they depended on the purely fortuitous circumstance of whether the predecessor State remained in existence. He failed to understand why a successor State in case of a separation should not incur any obligations resulting from the unlawful acts of a predecessor State that continued to exist — as was suggested in draft article 7 (1) — whereas a successor State in the event of a dissolution would incur such obligations, according to draft article 11 (1). The only rationale offered in the report was that there must always be someone to blame, but that might not really reflect justice and equity.

He supported the Special Rapporteur's position that one highly general theory of non-succession should not be replaced with another similar theory in favour of succession. However, since draft articles 10 and 11, among others, were not consistent with that position, he proposed that they should not be referred to the Drafting Committee at the current stage. Instead, the Special Rapporteur should conduct further research in order to ascertain whether sufficient practice or cogent arguments *de lege ferenda* could be identified in support of those draft articles.

To conclude, he supported the referral of draft articles 5, 6, 7, and 9 to the Drafting Committee.

Ms. Galvão Teles, after thanking the Special Rapporteur for his well-researched second report, said that she would begin by commenting on the title of the topic and then address some general issues arising from the report regarding draft articles 6 and 5. She would not at the current stage comment on the remaining draft articles related to the rules applicable to the different types of succession and reserved the possibility to make specific comments on all the seven draft articles proposed during the work of the Drafting Committee.

The title of the topic had a bearing on the content of the Commission's work, particularly on the question of the necessity or otherwise of determining a general rule of succession or non-succession in respect of State responsibility. Referring to the debate of

the Sixth Committee at the General Assembly's seventy-second session in 2017, she noted that the delegation of Austria had suggested that "State responsibility problems in cases of succession of States" would be a more apt title for the topic. Such a title would lead to a different — but perhaps more appropriate — approach, as it would shift the focus of the Commission's work onto the effects of instances of State succession with regard to State responsibility, rather than the determination of whether or not there was succession regarding responsibility, as suggested by the current title. It should be noted that the outcome resolution adopted by the Institute of International Law in 2015, much of which recalled the Commission's work on the topic thus far, was titled "Succession of States in matters of International Responsibility", and focused on the effects of State succession in respect of the rights and obligations arising out of internationally wrongful acts. As she had stated at the previous session, that area should also be the focus of the Commission's work, rather than that of State responsibility *per se*. That said, it was perhaps a matter that could be revisited at a later stage, in the light of the evolution of the work carried out.

Turning to general issues arising from the report, she said that she would like to address, first, the question of the establishment of a general rule as proposed in chapter III of the report, and in draft article 6, as compared to other approaches; and, second, the question of the legality of succession, the subject of chapter II and of draft article 5.

While appreciating the reasons behind the Special Rapporteur's proposal in paragraph 14 of the second report that an in-depth discussion of draft articles 3 and 4, as proposed in his first report, should be postponed, she said that the crucial issues raised in those draft articles warranted further consideration, since practice showed that they were often the object of settlements or of agreements and unilateral declarations.

Referring to the Special Rapporteur's appeal, in paragraph 16 of the report under consideration, for a flexible and realistic approach, the outcome of which might be, as he put it, "a confirmation of non-succession in certain legal relations arising from State responsibility and a formulation of special rules (or possible exceptions) on succession in others", she said that she continued to be of the view that the rules to be identified or established within the draft articles were merely of a subsidiary nature, as States would continue to prefer resolving such matters through unilateral undertakings or bilateral or multilateral agreement. Bearing that in mind, it might be useful to consider whether to include a provision in the draft articles concerning their subsidiary nature, similar to what was proposed in article 3 of the 2015 outcome resolution of the Institute of International Law. In that connection, she was still not convinced of the need for draft article 6, entitled "General rule", and would instead favour an approach consisting of the establishment of certain common rules and then the setting out of specific categories of State succession, similar to that adopted in the Institute's resolution.

As she had stated at the previous session, she agreed that the Commission's work on the topic should encompass all types of succession, although the comments by Mr. Reinisch with regard to newly independent States warranted further consideration. It was clear that different types of succession might require different solutions, in particular regarding whether or not there was a continuing State; that approach seemed to be supported by the Special Rapporteur.

The Special Rapporteur's second report hinged on whether or not a predecessor State continued to exist. That aspect, while of fundamental importance, was difficult to pinpoint in reality. The issue of the plurality of responsible States and shared responsibility was to be discussed only in the fourth report. In the meantime, it would be useful to have some clarity on such types of succession; otherwise, there was a risk that the conclusion as to the existence of a single general rule might be premature.

With regard to the legality of succession, she agreed with the analysis presented in chapter II of the report and the related draft article 5, although she noted Mr. Reinisch's comment that further consideration of the matter was necessary. The Commission's work on the topic of State succession was unique in that it relied on two different areas of international law and strove to provide guidance on the specific problem posed by the interaction between those two fields. That being said, the Commission could not avoid dealing with some general aspects of the system of international law. As the Special

Rapporteur pointed out in his report, there were two completely separate issues: the unlawfulness of territorial changes and the succession itself. However, identifying and dealing with those issues was not simple in practice.

The absence of an automatic compulsory superior authority to decide on the issue of whether a given situation was legal or illegal was also a problem. That in turn risked creating difficulties in the practical implementation of the draft articles and, in her view, militated in favour of an approach based on settling such matters by agreement between the parties concerned and on the subsidiary character of the solutions proposed.

To conclude, she supported the referral of all the proposed draft articles to the Drafting Committee, bearing in mind the comments made in the plenary meetings on the topic and the possibility of making specific drafting comments on draft articles as a whole in the Drafting Committee.

Mr. Rajput, commending the Special Rapporteur for his flexibility in being willing to keep draft articles 3 and 4 in abeyance until other segments of the topic had been completed, said that he was confident that the Special Rapporteur would not allow academic or theoretical convictions to prevent the Commission from reaching a reasonable outcome to its work on the topic.

Regarding methodology, it would have been helpful if the relevant provisions of the treaties referred to in the report had been set out in full either in the text or in footnotes. Furthermore, as in his first report, the Special Rapporteur referred to academic writings about certain cases rather than giving direct references to the cases in question; doing so gave the impression that the Special Rapporteur had not reviewed the cases himself but was relying upon the analysis of another scholar. It was not only convenient but also fair for Commission members to have the opportunity to examine the original sources in addition to the Special Rapporteur's own analysis of the cases.

Turning to the draft articles themselves, he said that he supported draft article 5, which appeared non-controversial. While it did raise questions as to the distinction between legal and illegal succession, he recalled that the Commission had already had a debate on such issues, when discussing what had become article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties; he did not believe that reopening such a debate would prove fruitful.

There were several conceptual problems with chapter III of the report and consequently with draft article 6. The title of section A within that chapter, "No impact of State succession on attribution", gave the impression that attribution of responsibility to a successor State was unaffected by the fact of succession. Moreover, that very notion could be perceived as a subtle reintroduction of the so-called change to the non-succession rule.

Referring to the second sentence in paragraph 42, which quoted from the commentary to the Commission's draft articles on succession of States in respect of State property, archives and debts, he said that it was unclear why just one sentence had been selected from the Commission's work on one topic relating to State succession and not another. Moreover, it was difficult to accept that one sentence, in relation to succession of debts — which was a specific instance of succession — could constitute the basis for a general rule that attribution of State succession was unaffected by succession. A similar point had been made by Sir Michael Wood.

In paragraphs 44 to 46 of his report, the Special Rapporteur declared that the Commission's articles on responsibility of States for internationally wrongful acts did not adhere to the rule of non-succession and that the Commission's work was based on the fact that the traditional doctrine of non-succession in respect of responsibility had come mostly from the period prior to the codification by the Commission of State responsibility, thereby indirectly suggesting that the traditional doctrine of State succession had changed since the Commission had completed its work on the articles on State responsibility. Paragraph 47 of the report went on to claim that the change had been effected by virtue of a few references, primarily those of two authors, one of which predated the Commission's work on State responsibility. The support for such a statement therefore seemed lacking.

Section A of chapter II ended on a radical note, shaking the most basic ideas of jurisprudence, particularly those on the relationship between rights and obligations. The suggestion that, with regard to internationally wrongful acts committed prior to succession, responsibility was attributable to the predecessor State, but that the successor State would still be responsible for reparation, to the extent that it could afford it, turned not only the rationale behind State responsibility, but the very idea of rights and remedies, on its head. Although no source was provided for the conclusions contained in paragraph 50, the latter's content reflected that of article 4 (2) and (3) of the 2015 outcome resolution of the Institute of International Law. In fact, the report, in paragraph 47, stated that the general rule was supported by paragraphs 1 and 2 of article 4 of the same resolution, but failed to mention paragraph 3, which radically stated that a successor State would bear some responsibility, at least to the extent of paying reparations, within its means. Paragraph 25 of the provisional report of the Special Rapporteur of the Institute of International Law on the succession of States in matters of international responsibility provided some arguments as to why that should be so. In that report, the Special Rapporteur had relied on article 11 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which stated that State succession did not affect "a boundary established by a treaty" or "obligations and rights established by a treaty and relating to the regime of a boundary". It was important to note that boundary treaties had been dealt with separately owing to their importance in international relations. The doctrine of *rebus sic stantibus* did not apply to boundary treaties under article 62 (2) of the 1969 Vienna Convention on the Law of Treaties. It was weak logic to argue that since boundary treaties were succeeded to by States, there was a duty to pay reparation even if the responsibility was not part of the succession *per se*. That very discussion appeared in draft article 6 (4) as a without-prejudice clause, about which he had serious reservations. While the consideration of the so-called change to the non-succession rule was still pending, he wondered if it was appropriate for the Commission to consider draft article 6 (4), which was also trying to introduce the same notion. He therefore did not support the referral of draft article 6 (4) to the Drafting Committee.

The idea of a successor State being responsible for reparations appeared to be the focus of the report. The Special Rapporteur, in developing that logic, argued that all that needed to be established was the attribution of responsibility. In paragraph 48 of the report, he declared that there were two exceptions to the rule of non-succession: continuing breaches, as provided for under article 14 (2) of the articles on responsibility of States for internationally wrongful acts; and composite acts, as provided for under article 15 of that text.

The doctrine of continuous and composite acts was well settled in jurisprudence and uncontroversial, but the question was whether it was relevant in the context of succession, as suggested in the report. It was important to draw a distinction between succession of government and succession of State. The former had no effect on the legal personality of a State, so a government's acts were binding on its successor. The latter, meanwhile, did change the legal personality of a State, as a successor State was a new State. In the case of a continuing breach, a successor State was independently responsible for the breach from the time when the State came into existence. The continuous character of a breach could not have any impact on attribution, because the new State had not existed when the breach had commenced. The concepts of "continuing breach" and "composite act" were of little relevance in situations of State succession. Article 14 (2) of the articles on responsibility of States for internationally wrongful acts contained a reference to "an act of a State having a continuing character", while article 15 included the words "breach of an international obligation by a State through a series of actions or omissions". In both situations, the act or acts had to be committed by the same State, not another State with a distinct legal personality. He hoped that, as noted by Mr. Reinisch, the Commission's quest to put the blame on someone did not lead it to go against what had been established in the articles on responsibility of States for internationally wrongful acts. If one studied an example given in the articles to explain a composite or continuous act, the situation became quite clear: the responsibility of a successor State for the unlawful occupation of an embassy arose only after the date of succession.

While he had no serious reservations about proposed draft article 6 (1) to (3), he was concerned that the relevant discussion in the report might find its way into the commentaries and expand the scope of the provisions, which was to be resisted.

Although proposed draft articles 7 to 10 dealt with different types of succession, four common themes were evident: reliance on treaties, activities of organs, territorial nexus and insurrectional movements. The four themes were present in the provisions to varying degrees. He agreed with the Special Rapporteur on the theme of insurrectional movements, but not the other three. The first theme, which was essentially methodological in nature, was reliance on treaties, which formed the basis of the texts of specific instances of succession. In all the treaties mentioned in the report, the successor State had agreed to undertake responsibility only in relation to the State with which it had entered into a treaty, and the responsibility had been undertaken only in relation to a certain subject matter covered by that treaty. The successor State had not undertaken responsibility across the board or towards other States. The example from Viet Nam provided by Mr. Nguyen in his statement had been particularly helpful in that regard.

The second general theme was the responsibility of a successor State for the actions of an organ of its predecessor State. The theme was presented in proposed draft articles 7 (2) and 9 (2). The title of the relevant discussion in the report included the term "autonomous entity", which was not defined anywhere or used in the text of the proposed draft articles, where one instead found references to "an organ of a territorial unit". He assumed that the Special Rapporteur was employing the two descriptors synonymously, yet they probably had different meanings. The term "autonomous entity" evoked some sort of independent body such as the judiciary, whereas a "territorial unit" appeared to be something connected with regional or local administration. It was not clear exactly what type of body was envisaged in the proposed draft articles.

The only material presented in the report in support of that territorial nexus — according to which, if the breach of an international obligation related to a certain territory, a successor State in that territory succeeded to the obligation — was a brief description in paragraph 97, which included a citation to paragraph 65 of the *travaux préparatoires* of the Institute of International Law from 2015. Apart from that, he could not find anything in the report to substantiate the theory of a territorial nexus or the idea that an autonomous unit that had committed a wrongdoing prior to succession would continue to bear responsibility after succession, which almost gave the impression that an organ of a State continued to exist after succession, whereas a new State was endowed with a new legal personality.

Regarding the notion of a territorial nexus, how did one identify which violations of international law or breaches of international obligations were linked to a given territory? Expropriation, for instance, always related to property. Did that mean that all expropriations had a territorial nexus and that responsibility for them was passed on?

Ultimately, he was not comfortable with referring to the Drafting Committee any of the proposed draft articles that were grounded in the notion of a territorial nexus, namely draft articles 7 (3), 8 (2) and 9 (3). On the theme of insurrectional movements, he agreed fully with the Special Rapporteur and had no reservations.

As to proposed draft article 11, on dissolution of States, he agreed with paragraph 1, but had some reservations regarding paragraph 2, which imposed an obligation to negotiate in good faith. He did not think that the Commission should introduce the doctrine of the duty to cooperate, which had a certain normative value.

The Commission had to seek a balanced form of justice. In protecting the interests of a wronged State, the wrong party should not be held accountable. The work of the Institute of International Law was of great importance to the topic and should be used as a source of inspiration. The Commission should be aware, however, that the Institute operated in a different setting. It was good that the Institute's work should serve as a point of departure for the topic, but it ought not to be the final destination.

To conclude, he did not support the referral of proposed draft articles 6 (4), 7 (2) and (3), 8 (2) or 9 (2) and (3) to the Drafting Committee. He struggled to see how sufficient material could be found to support the provisions in question in the commentaries. He was

comfortable with the remainder of the provisions being sent to the Drafting Committee. Despite his reservations, he looked forward to seeing what shape the topic took in the future.

Mr. Aurescu said that he wished to praise the Special Rapporteur for his excellent report, his very complete and enlightening oral presentation of it and his outreach efforts aimed at highlighting the importance of the topic in various academic environments.

As noted by the Special Rapporteur, the purpose of the report was to "address, in addition to certain general rules, mainly the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State". He welcomed the fact that the report proposed a new approach to the topic in the light of the debate that had taken place during the sixty-ninth session of the Commission, with the Special Rapporteur having understood the importance of examining general substantive rules relating to succession of States in respect of State responsibility before turning to potential exceptions or saving clauses. He also welcomed the methodology embraced in paragraph 16 of the report, in which the Special Rapporteur admitted that State practice was diverse, context-specific and sensitive in the area of succession or non-succession in respect of State responsibility. Consequently, the Special Rapporteur did not suggest replacing the general theory of non-succession with another similar theory that favoured succession, and agreed that a more flexible and realistic approach was needed.

Bearing in mind the theory of non-succession, he found the reference, in paragraph 148 of the report, to a so-called "presumption of succession" in respect of obligations arising from State responsibility somewhat questionable. For the same reason, he had reservations about the call, in paragraph 167, for a "rejection of a strict and automatic application of the principle of non-succession". A similar line of reasoning was followed in paragraphs 185 and 187.

While he agreed with the approach mentioned in paragraph 17 of the report, he did not fully understand the relevance of the assertion, in paragraph 19, that the concept of State responsibility under contemporary international law was "a bundle of principles and rules of a secondary character". Nevertheless, he agreed with the Special Rapporteur's argument in paragraph 20 that, in determining general rules of succession or non-succession, various factors had to be taken into account, such as whether a breach was completed or continuing, localized damage and especially the continuing existence or disappearance of a predecessor State.

Concerning paragraph 21, it was not clear why the Special Rapporteur chose to deal with the issue of the transfer or non-transfer of obligations arising from an internationally wrongful act committed by a predecessor State before the issue of the transfer of rights and claims, which the Special Rapporteur planned to examine in his third report.

In paragraph 35, the Special Rapporteur mentioned the case law of the European Court of Human Rights regarding Cyprus. It would also be useful to examine cases regarding Transnistria, such as *Ilaşcu and Others v. Moldova and Russia*, *Ivanţoc and Others v. Moldova and Russia*, and *Catan and Others v. Moldova and Russia*, which might be of relevance to the practice of not accepting statehood.

In paragraph 37, the Special Rapporteur stated that, "apart from cases of consensual, agreed succession or devolution and the cases of the above-mentioned illegality, there are quite a few situations of unilateral declaration of a new State as a result of insurrection or revolution. Those are social facts not considered to be in violation of international law". The Special Rapporteur seemed to infer that, between the cases where succession or devolution were illegal and those where they were legal, there was a grey area in which cases could not be classified because they were "social facts" and so could not be "considered to be in violation of international law". The Special Rapporteur cited paragraph 81 of the International Court of Justice's advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*. However, in that paragraph, the Court confirmed that "no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council". In reality, in its advisory opinion, the Court had not examined the legality of the statehood of Kosovo. Rather, it had considered whether or not the act of declaring

independence had been in conformity with international law. In paragraph 51 of the advisory opinion, it was asserted that:

> "In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."

In conclusion, there was no such thing as a social fact that excused or excluded the application of international law: a succession was either in conformity with, or in breach of, international law. *Tertium non datur*.

In paragraph 38, the Special Rapporteur followed the same kind of approach, mentioning secession for the first time in the report. Although secession was a typical category of succession, the word "even" at the beginning of the paragraph was insufficient to explain why secession had been included for demonstrative purposes. That the reference to secession was misplaced was further substantiated by the fact that paragraphs 37 and 39 referred not to secession, but to succession, and the fact that secession was addressed *expressis verbis* in paragraphs 78 *et seq*.

The ideas that underpinned paragraph 46 seemed, at times, to be contradictory. It was mentioned, first of all, that a wrongful act should not be attributed to any State other than the one responsible for it. The conclusion of that line of argument was that the predecessor State and the successor State were excluded from the application of responsibility. In the same paragraph, however, it was mentioned that the continuing State, *i.e.* the predecessor, should remain responsible for its own internationally wrongful acts. It appeared, therefore, that the paragraph established both a rule and an exception.

In paragraph 47, reference was made to "more recent" writings, namely scholarly works from 2007, which were indeed recent, and ones from 1990 and 1992, which, in his opinion, could no longer be described as recent.

The discussion of reparation and State responsibility in paragraphs 49 and 50 was not particularly clear. It was difficult to establish the meaning of the paragraphs in the context of remedies other than reparation that States could request, and which remedies were included in the notion of reparation. Paragraph 54 complicated matters further by implying that cessation was not necessarily a form of reparation.

The link between responsibility and damage, or reparation, was dealt with in a number of paragraphs in the report. In paragraph 83, for example, it was stated that Czechoslovakia, Poland and Yugoslavia "should not bear responsibility for such damage". While the quoted language was not necessarily that of the Special Rapporteur, the provisions of article 1 of the articles on responsibility of States for internationally wrongful acts should be observed. Indeed, the idea that responsibility arose when wrongful acts occurred, and not when damage occurred, was one of the pillars of State responsibility. He would have preferred to see a more thorough explanation in the report of the interlinkages between "responsibility", "reparation" and "damage", with the end goal being the observance of article 1 of the articles on responsibility of States for internationally wrongful acts.

The phrase "*tabula rasa*", which was first used in paragraph 124 of the report, should have been explained in greater detail, as its meaning in the context of State succession was not necessarily the same as its regular meaning. Lastly, the Special Rapporteur should have elaborated on the notion of a "territorial limitation" clause, which was mentioned in paragraph 170 of the report.

Turning to the proposed draft articles, he said that he had no substantial comments to make about the drafting of proposed draft article 5. He would, however, prefer to speak of "succession", rather than "a succession", in order to keep the wording more general.

It was his understanding that the purpose of proposed draft article 6 was to set the scene for the provisions that followed, taking into account its general nature and its title, "General rule". In his view, the proposed draft article should be made clearer and more streamlined. The first two paragraphs seemed to contradict each other, in that, if the first was valid, the second was invalid. Although the second paragraph was probably meant to establish an exception to the rule set out in the first, the relationship between the two paragraphs should be more obvious from the manner in which they were drafted.

He would also suggest replacing the words "a reparation" with a more general reference to "reparation". The use of an indefinite article could imply that only one form of reparation could be requested when a wrongful act occurred. In reality, however, reparation could be achieved in international law through a multitude of mechanisms, and no exclusions or limitations were applicable, with the exception of the ones provided for in the articles on responsibility of States for internationally wrongful acts, notably article 35.

Furthermore, and perhaps most importantly, it should be recalled that the articles on responsibility of States for internationally wrongful acts provided that the notion of responsibility was not strictly connected with the notion of injury and that the existence of a wrongful act was the main element of responsibility. As a result, State responsibility could be invoked even if no injury existed, or, in other words, no damage had been suffered.

The provisions of paragraph 3 were clear and sufficiently well developed. For the sake of clarity, however, he would replace the word "it" with "the successor State".

Proposed draft article 7 (1) was effective in establishing the general rule applicable to secession of States. In paragraphs 2 and 3, the words "if particular circumstances so require" could be deleted, as their inclusion might raise issues related to the interpretation of "particular circumstances" and to the link between the circumstances and the requirement. In paragraph 4, he would welcome a more detailed explanation of the situations in which the conduct of a movement, insurrectional or other, that succeeded in establishing a new State in part of the territory of a predecessor State or in a territory under its administration, could trigger the responsibility of the new State and be considered an act of the new State. The text as it stood seemed to focus on the conduct, rather than the responsibility.

Proposed draft article 8 (1) was effective in establishing the general rule applicable to newly independent States. The formula "newly independent State" should be either included in the definitions or explained in the commentary to the draft article. In paragraph 2, the word "agrees" should be replaced with "agree". As in proposed draft article 7 (2) and (3), the concept of "particular circumstances" could be removed. If it was retained, however, the preceding definite article should be deleted, given that it was the first reference to "particular circumstances" in the draft article. Deleting the definite article would avoid any controversy over which particular circumstances were being discussed. The word "substantive" could also be deleted in paragraph 2, as the differences between substantive and procedural autonomy could raise difficult questions related to State responsibility.

He had no comments to make regarding proposed draft article 9 (1). In paragraphs 2 and 3, the words "particular circumstances" could again be deleted, for the reason given in relation to proposed draft article 7 (2) and (3). On a more general note, the word "territory" should be clearly defined in the commentary to the draft article. In particular, it should be specified whether the word referred only to State territory or also covered other areas over which the State exercised sovereign rights and jurisdiction, such as exclusive economic zones, contiguous zones and continental shelves. In his view, those areas should also be covered by the rule established in proposed draft article 9.

In proposed draft article 10 (2), the word "arising" should be included, as it was in paragraph 1. Paragraph 3, as currently drafted, could be interpreted as meaning that the consent of a State that claimed a breach of an international obligation, referred to as the "injured State" in proposed draft article 10, was not a condition for a valid agreement related to the responsibility of a new State. The word "including" might prove controversial, since it raised questions over whether a valid agreement would be bipartite or tripartite. Consequently, the provision should be redrafted.

In proposed draft article 11 (1), the phrase "the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States" was rather confusing. It opened such a wide range of possibilities that it became difficult to determine the specific rule to be followed in respect of State responsibility in the event of dissolution.

In paragraph 2, while the inclusion of a reference to good faith negotiations between States was commendable, he did not necessarily agree with the implied inclusion of elements such as "a territorial link" and "an equitable proportion" within the scope of good faith. The manner in which good faith was interpreted should not be limited, even vaguely, by notions of "equity".

In conclusion, he wished to reiterate his appreciation of the Special Rapporteur's work. Taking into account his earlier observations, he was in favour of sending all the proposed draft articles to the Drafting Committee.

The meeting rose at 12.10 p.m. to enable the enlarged Bureau to meet.

Provisional

For participants only

9 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3433rd meeting
Held at the Palais des Nations, Geneva, on Thursday, 19 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12) (*continued*)

The Chair proposed, in the light of consultations with the enlarged Bureau, that the topic "General principles of law" should be included in the Commission's programme of work and that Mr. Vázquez-Bermúdez should be appointed as Special Rapporteur.

It was so decided.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of succession of States in respect of State responsibility.

Mr. Jalloh, thanking the Special Rapporteur for a thoughtful second report, said that he largely agreed with the substance of the views expressed by those of his colleagues who had already taken the floor, in particular Mr. Park, Mr. Murase, Mr. Murphy, Mr. Reinisch and Sir Michael Wood. From the debate on the topic in 2017, it had appeared that some Commission members and delegations in the Sixth Committee considered the topic to be important and believed that its inclusion in the Commission's programme of work would help to clarify the applicable legal rules in a rather complex and politically sensitive area of international law. However, as detailed in paragraph 64 of the topical summary of the discussion held in the Sixth Committee (A/CN.4/713), some delegations had expressed doubts as to the usefulness and timeliness of the topic. Some Commission members, including Mr. Murase, had echoed those doubts the previous day. It was noted in the topical summary that, in the view of some delegations in the Sixth Committee, the complexities of the topic and the absence of clearly established customary international law rules in that area made codification of rules difficult, if not impossible, in practice. The Special Rapporteur had acknowledged the controversial nature of the topic and the limited State practice in that area. His "flexible" approach to the topic, which would take into account the collective nature of the Commission's work, was therefore to be welcomed.

The Special Rapporteur's approach should enable the Commission to produce work that was useful to all States, despite the fact that, as noted in paragraph 16 of the report, cases of State succession were relatively rare and State practice in that respect was diverse, context-specific and sensitive. Ultimately, as noted in paragraph 13, there was "a need for international law to serve as a framework to ensure legal security and stability in international relations".

He agreed with the Special Rapporteur's recommendation that the Commission should postpone its discussion of draft articles 3 and 4, which concerned the role of agreements and unilateral declarations, respectively. They should be held in the Drafting Committee until the other draft articles on the topic, in particular those articulating general rules on succession of States in respect of State responsibility, had been provisionally adopted. Only afterwards would the Drafting Committee and the Commission be in a position to decide on the final wording and placement of the draft articles previously proposed.

Like many other Commission members, he welcomed and endorsed the Special Rapporteur's revised position regarding the rule of non-succession of State responsibility, which was based on the premise that it was not for him or the Commission to suggest replacing one highly general theory of non-succession by another similarly general theory in favour of succession.

Lastly, he fully agreed with the Special Rapporteur's use of existing treaty language in the formulation of the draft articles, specifically the language of the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. That approach could be beneficial and added legitimacy to the discussion of the topic. However, it should

be borne in mind that, as noted in paragraph 8 of the report, the number of States that had ratified those conventions was relatively small. Although the reasons for that broad lack of acceptance remained unclear, it should nevertheless be taken into consideration, as should developments that had since taken place and the specific context of the Committee's work on the topic of succession of States in respect of State responsibility. He agreed that the Commission should also take into consideration the content of its articles on responsibility of States for internationally wrongful acts, using both inductive and deductive methods, as required, while also asking whether, and if so to what extent, that content also applied in situations of succession of States. The Commission's completion of that task could actually be the key added value of its work on the topic.

He wished to commend the Special Rapporteur on the manner in which he had presented the draft articles proposed in his report. It was always helpful if the draft provisions proposed in a report were printed immediately after the relevant analytical sections. That style of presentation allowed the Commission and States to understand the logic of the proposals.

Draft article 5, which introduced a general rule on the legality of succession under international law, should be uncontroversial. It was not only supported by sound and convincing analysis, but was also based on text that had already been endorsed by States, namely article 6 of the 1978 Vienna Convention and article 3 of the 1983 Vienna Convention. That text was supported by General Assembly and Security Council practice, including General Assembly resolution 2024 (XX) and Security Council resolutions 216 (1965) and 217 (1965). As the Special Rapporteur had noted, draft article 5 was a "modest provision" that would help to avoid any misunderstandings regarding the scope of application of the draft articles. In his view, the interpretative problems mentioned in paragraph 28 of the report could be addressed in the commentary.

Draft article 6, which sought to put forward a general rule, was a little cumbersome and unclear, as several Commission members, including Mr. Murphy, had already noted. The Special Rapporteur gave a fairly theoretical overview of various general rules relating to State succession and State responsibility. He highlighted the character of a breach and its relation to a successor State's responsibility. That analysis did seem helpful. The structure of draft article 6 also raised a number of questions. Overall, however, the proposed draft article was very good, and he generally agreed with it on the substance. Like Mr. Murase, he wondered whether better and simpler phrasing could be found. For example, draft article 6 (1) could read: "State responsibility for an internationally wrongful act committed before the date of succession of States is attributable to the predecessor state." He also wondered whether draft article 6 could not be restructured so as to make it more accessible to the non-specialist.

He was in favour of referring all seven proposed draft articles to the Drafting Committee for further consideration.

Mr. Hmoud said that, in his comprehensive and well-researched second report, the Special Rapporteur had carefully analysed relevant examples from jurisprudence, practice and treaty law in order to establish a basis for his proposed draft articles. It was important to note that the Special Rapporteur had taken into account the comments made by Commission members in the plenary debate and by delegations in the Sixth Committee regarding the need to reframe the key proposition underpinning the theory of succession in respect of State responsibility. In paragraph 16 of the report, the Special Rapporteur confirmed that the general rule was non-succession of State responsibility. Several of the provisions of the draft articles proposed in the second report did indeed attest to that proposition. However, the analysis contained in the report and the exceptions proposed seemed to indicate that the Special Rapporteur had decided to scale back the application of that general rule to such an extent that it had essentially been emptied of its content. The impact of that decision was most apparent in draft articles 10 and 11, but it could also be seen in some of the other draft articles. The cases cited and the examples of agreements and treaties provided did not constitute a firm basis on which to reverse the general rule of non-succession. Those examples had already been discussed at length, and the Commission would reach the same conclusion if it discussed them again, even in the context of specific situations of succession, such as secession, newfound independence, cession, unification or

dissolution. Accordingly, he urged the Special Rapporteur to reconsider his approach and to revise the draft articles so that they accurately reflected the general rule of non-succession and so that any exceptions rested on a firm basis.

The deliberations in the Sixth Committee in 2017 had shown that the topic and the Commission's work on it continued to evoke considerable scepticism. One of the issues raised in that context was whether the Commission should be engaged in the progressive development of rules or in their codification. Nevertheless, even the advocates of progressive development had emphasized that the Commission should base its work on existing practice. In his view, the Commission could perform both functions, provided that there was a strong trend in favour of the development of specific rules for specific situations. However, it did not follow that the Commission should base its work on policy preferences that served certain legal interests and not others, that such preferences should cause existing law to be overturned, or that new law should be created not only *de lege ferenda* but for its own sake.

With regard to the work of the Institute of International Law, he believed that, although the Commission should consult the work of other bodies of international law experts, its own mandate was distinct. The Commission's mandate was established in its Statute, which placed conditions on its work and the outcomes of its work. Other bodies of international law experts were able to exercise greater freedom in reaching their outcomes. In addition, whereas the products of the Commission's work were submitted to the General Assembly for adoption, other bodies were not subject to the same level of scrutiny. States remained the key arbiters of the value of the Commission's work, which was the reason for its authority in the eyes of courts and tribunals. The Commission should therefore take great care in reaching its conclusions, which would require it to base its work on existing practice and to refrain from advancing policy preferences.

He agreed with the argument made by the Special Rapporteur in paragraph 17 of his report that the Commission did not necessarily have to base its general approach on the 1978 and 1983 Vienna conventions. The topic of succession of States with respect to State responsibility raised different issues, and the underlying concepts and practice were associated more with the law of State responsibility than with the law of treaties and the international rules governing State debts and archives.

That brought him to a second point on methodology. The draft articles should not undermine the general rules contained in the Commission's articles on State responsibility. The value of those articles was well recognized by the international and national courts, as well as in State practice, as they reflected customary international law. He hoped that the Special Rapporteur's characterization of the articles as "non-binding" did not presage a departure from their rules, in particular article 1, which was their cornerstone, and article 2, on the elements of an internationally wrongful act of a State. He was concerned that several of the key propositions contained in the Special Rapporteur's second report departed from the key constituent element of an internationally wrongful act, namely the attribution of the act to the State that had committed it. Indeed, one came to the conclusion that several of the proposed draft articles disposed of the requirement that a wrongful act had to be attributed to the wrongdoer in order to trigger that State's responsibility. Instead, a successor State would be assuming obligations arising from a wrongful act that it had not committed. While such a State might under certain circumstances be required to fulfil certain obligations of a predecessor State, the law of State responsibility was not the basis for the assumption of such obligations. Such issues could be discussed in the context of the formulation of the draft articles, but other alternatives should seriously be considered, including the possibility of "no prejudice" clauses on the applicability of other regimes or rules of international law. Greater emphasis should also be placed on agreements whereby a successor State assumed certain obligations on behalf of predecessor States.

The Special Rapporteur's decision to limit the consequences of responsibility to reparation had not been explained. It was also not clear why the Special Rapporteur had excluded other aspects of State responsibility, for example the circumstances precluding wrongfulness, the consequences of serious breaches or the implementation of responsibility. Although draft article 6 did deal with the invocation of responsibility, it did not do so in a holistic manner.

With regard to the legality of succession, the report advanced good arguments in favour of limiting the application of the draft articles to situations of legal succession, including the fact that both the 1978 and 1983 Vienna conventions applied only to situations of lawful succession. He would point out that there was a difference between the recognition of an unlawful situation, such as succession resulting from an unlawful use of force, and the consequences in terms of responsibility. However, in reality, many situations of succession stemmed from the unlawful acquisition of a territory that, over time, had become recognized. While the Commission should not wish to encourage the recognition of such unlawful succession, he was not sure that it should exclude its effects outright, not least because many modern States had originally been established by unlawful succession, had illegally absorbed other territories into their own or had employed force to unify or dissolve other States. Nonetheless, if the Commission saw fit to exclude such unlawful succession, the language of draft article 5 was clear enough to embody that principle.

The Special Rapporteur seemed to support the basic tenet of State responsibility, namely attribution, particularly with regard to the situation of a continuator State. Nonetheless, he had departed from that essential element of responsibility, even though it had been included in draft article 6 as a general rule. The report included a discussion of two situations of particular importance to succession of responsibility, namely breaches of a continuing character, which were dealt with in draft article 6 (3), and the situation of a composite act, which was not dealt with in the draft articles, at least explicitly. He was not opposed to that approach, but he did not understand the need to include a separate provision on acts having a continuing character, particularly as such an act triggered the responsibility of the successor State on the strength of its own unlawful conduct alone. However, his main issue was with the way in which attribution was dealt with in draft article 6 (1), which provided that succession of States had no impact on the attribution of an internationally wrongful act committed before the date of succession. That provision did not add anything. Instead, what it did was to prepare the ground for making the attribution of a wrongful act a secondary matter for establishing responsibility in the case of State succession. It should be stated clearly that responsibility for a wrongful act in cases of succession of States arose only for the State that had committed that wrongful act.

Draft article 6 (2) undermined the general rule of non-succession. Moreover, it limited the invocation of responsibility to the claim of reparations. It was not a general rule on non-succession, but a formulation that was not based on the preceding analysis in the report. He would urge the Special Rapporteur to produce a clear and direct draft article that would expressly provide for the rule of non-succession as a general rule and not only for situations of a continuator State.

That brought him to draft article 6 (4), which incorporated an exception into the general rule. That paragraph allowed the injured State to claim reparation from the successor State for a wrongful act committed by the predecessor State in the situations covered by the subsequent draft articles. He could not see what purpose was served by including that paragraph in draft article 6, which was entitled "General rule". He therefore supported deleting draft article 6 (4) altogether. If there were legitimate exceptions, such as the case of wrongful acts of an insurrectional movement that had established a new State, they could be provided for in the relevant draft articles, namely draft articles 7 and 8. However, the case of an insurrectional movement could hardly be considered an exception.

That brought him to part three of the report, which was intended to justify a departure from the general rule of non-succession and the requirement to attribute the wrongful act to the wrongdoer as the basis for an obligation. The Special Rapporteur drew a distinction between situations in which a predecessor State had continued to exist and those in which it had not. In the first of those categories, the Special Rapporteur accepted the general rule of non-succession of responsibility, with a number of exceptions and qualifications; in the second, however, the exception, namely succession of obligations, became the rule. With regard to the first category, draft article 7 dealt with the situation of secession, or separation of parts of a State. It was unclear how the general rule of non-succession or the exceptions to that rule had been derived from the Special Rapporteur's discussion of specific examples, including the case of the Austro-Hungarian Empire and that of the Soviet Union.

In paragraph 92 of the report, the Special Rapporteur had cited the work of the Institute of International Law in order to reach conclusions regarding the circumstances that justified deviation from the general rule. As detailed in paragraph 93, those circumstances included internationally wrongful acts committed by an autonomous entity of the predecessor State, a link between the wrongful act and the relevant territory, and the question of unjust enrichment. Those circumstances were supported not by relevant practice, but by doctrinal and scholarly writings, among which those of one author played a central role. Nevertheless, draft article 7 dealt not with wrongful acts by autonomous entities, but with wrongful acts by insurrectional movements, which were not the same and did not really constitute an exception.

In draft article 7 (3), a direct link between an internationally wrongful act of the predecessor State and the territory of the successor State was used to justify the assumption of obligations arising from that act. Once again, the report provided no evidence of practice in support of that proposition, although there might be a basis for progressive development outside the doctrine of State responsibility. The question remained whether it would be fair to oblige a State to assume obligations arising from the wrongful act of another State, even if there existed a link between that act and the territory of the new State. Nor was any evidence provided in the report to support the proposition of the transfer of obligations arising from the wrongful act of an organ of a predecessor State that had become part of the successor State. The question of unjust enrichment had not translated into a provision in the draft articles, but he suspected that it underpinned draft articles 10 and 11. However, in civil law systems, unjust enrichment was not an element or a circumstance but was an independent source of obligations, like torts and contracts. If the matter fell under *de lege ferenda*, he would suggest that the Special Rapporteur should specify that unjust enrichment was a source of obligations.

His views on draft article 7 also applied to the structure and content of draft articles 8 and 9. In addition, draft article 8 (2), on newly independent States, provided that, if a State agreed, the obligations arising from the wrongful act of the predecessor State could be transferred to the successor State. However, it was added that "particular circumstances" could be taken into consideration. He was not sure whether such circumstances were relevant if a newly independent State agreed to assume responsibility on behalf of the predecessor State. For that reason, the first part of the paragraph should be a separate provision from the second. As for the particular circumstances themselves, the example of Morocco was not sufficient to establish practice in favour of creating a rule in favour of succession for newly independent States. The other examples given, including the example of the actions of the Front de Libération Nationale in Algeria, were relevant to draft article 7 (3), on the conduct of national liberation movements, although nothing in those examples indicated that a newly independent State assumed responsibility on behalf of a predecessor as a matter of general international law.

In addition, in succession situations, whether the predecessor State existed or not, the successor States could assume obligations arising from the responsibility of the predecessor State for political reasons rather than from a sense of legal obligation. Such political considerations should not be interpreted as an indication of *opinio juris* in favour of a general rule on succession.

Turning to cases of succession in which the predecessor State did not exist, which were dealt with in paragraphs 147 and 148 of the report, the Special Rapporteur had asserted, as a policy preference, that obligations arising from the wrongful act of a predecessor State should be assumed by a successor State on the basis of the principles of equity and justice. That preference was described in the report as a "presumption of succession" that could be rebutted by an agreement between the States concerned, although it was essentially not a presumption but a general rule on succession that could be superseded by the special rules in an agreement on the assumption and sharing of obligations. He agreed with other Commission members that policy considerations and an assertion of a sense of justice and equity were not sufficient grounds on which to amend the general rule of non-succession. Even though the proposed rule dealt only with the assumption by a successor State of the consequences of a wrongful act of a predecessor State, there was no legal basis for it. Attribution remained a cardinal element of the

assumption by the wrongdoer of responsibility for a wrongful act. He could not see how it was fair that a new State that was not responsible for a wrongful act committed by a predecessor State should assume responsibility for the consequences of that act. Of course, the new State could assume obligations arising from the wrongful act of another State either by agreement or by a unilateral declaration. It might wish to do so for reasons of political convenience, but not from a sense of legal obligation.

The examples provided in the report, from paragraph 149 onwards, were based either on agreement or on unilateral acts, but none of them pointed to the existence of a general rule on succession. He was not sure on what legal basis the Special Rapporteur had concluded, in paragraph 185 of his report, that the legal obligations arising from the wrongful act of a State did not disappear with its dissolution. Moreover, as the Special Rapporteur recognized in the same paragraph that it was unclear to which of the successor States the obligations arising from an internationally wrongful act passed and to what extent, he could not see how a presumption of transfer of obligations could be created. In paragraph 189, the Special Rapporteur noted that it currently seemed impossible to determine with sufficient clarity all the factors that should be taken into account in order to apportion responsibility among successor States. Nevertheless, the Special Rapporteur was effectively taking that approach anyway, and it was doubtful that such an approach was right and just.

In view of that, he was prepared to support the referral of draft articles 10 and 11 to the Drafting Committee, provided that the Drafting Committee was permitted to alter the underlying rule. With regard to draft article 11 (2), he found the Special Rapporteur's proposition regarding the need for good faith negotiations acceptable.

He recommended referring draft articles 6 to 11 to the Drafting Committee.

Mr. Petrič said he welcomed the fact that, in his excellent second report, the Special Rapporteur had taken account of the Commission's debate on the topic at the previous session and the discussion in the Sixth Committee, which had resulted in quite a significant change in the Special Rapporteur's thinking as compared with his first report. The topic was indeed a controversial one, as was reflected in the diverse, albeit limited, practice of States. The lack of practice had also been reflected in the reaction of States to the first report. As the last part of the international law on State succession to be codified, the topic had also recently been the subject of studies by the Institute of International Law and the International Law Association, both of which the Special Rapporteur had drawn on in his report. Of course, as Mr. Hmoud had noted, it must be recalled that the Commission was a subsidiary organ of the United Nations while the other bodies were private institutions and, as such, had different considerations to take into account.

The crucial research problem posed by the topic was the extent to which the general rule of non-succession in respect of State responsibility was limited by exceptions in certain legal situations and, consequently, which, if any, new rules concerning such exceptions had been or might be established as progressive development of international law. In his view, for new rules to depart from the general rule of non-succession, they should be exceptional and should clearly reflect State practice, not merely wishful thinking on a matter of doctrine. One or two court decisions or cases in practice were not sufficient, particularly as the former did not create law but merely helped to identify it. It was risky to try to convert specific *sui generis* regulations into general rules of international law or, as in the case before the Commission, rules concerning exceptions. For example, the unification of Germany could not be considered to establish a general rule of unification and, consequently, could not form a legal framework for the possible unification of Korea at some time in the future. As most of the examples of succession were unique, a very careful approach was required to deduce rules and exceptions from them. The comments made in that respect by Mr. Rajput, Mr. Reinisch, Mr. Hmoud and others had been very pertinent.

His own position concerning the "softening" of the rule of non-succession in respect of State responsibility and the introduction of the rule of succession, even if only in exceptional cases, was very conservative. Only cases that reflected common practice and existing, or at least self-evidently emerging, new customary international law could provide sufficient proof to establish exceptions from the general rule of non-succession. In that

context, he supported the view expressed by the Special Rapporteur in paragraph 16 of the report, namely that he was not suggesting replacing one highly general theory of non-succession with another similarly general theory in favour of succession and that a more flexible approach was needed. As the Commission was drafting a set of articles for a possible future convention, rather than draft guidelines, principles or conclusions, it should exercise particular caution and only establish exceptions that were based on solid State practice. In his report, the Special Rapporteur presented cases involving continuing breaches and insurrectional or other movements as exceptions to the general rule which were to be established through special rules. In order for the various exceptions provided for in draft articles 6 (3), 7 (2), 7 (3), 8 (2), 9 (2) and 9 (3) to be established as exceptional legal rules, they must be based on the practice of States.

Those exceptions from the general rule of non-succession involved cases where the predecessor State that had committed the wrongful acts continued to exist. The Special Rapporteur elaborated on them using several examples, but those examples were limited in number and often reflected contradictory practices. In his view, based on State practice, the rule of non-succession should be upheld if the predecessor State to which a wrongful act had been attributed still existed. If, however, responsibility for the wrongful act was to be exceptionally transferred to the successor State, that could only be done through an agreement or, if the predecessor and successor States had agreed to seek a judicial resolution, a judicial decision. The Special Rapporteur should perhaps pay more attention to the role of agreements between the still-existing predecessor State and the successor State or States, and to the effects of judicial decisions. The still-existing predecessor State and successor States could resolve any matters of succession, including those related to State responsibility, through an agreement. Such an agreement could replace the rules of international law on succession, which were not rules of *jus cogens*. The Commission should thus confirm the subsidiary nature of the rules of succession, in particular rules concerning any exceptions that might be established.

Regarding cases where the predecessor State no longer existed, in draft article 10 the Special Rapporteur stipulated that, in the case of unification, the obligations of the predecessor State "passed" to the successor State. Thus, the rule of non-succession seemed to be replaced by a rule of succession. However, according to draft article 10 (3), with which he agreed, an agreement among the States concerned, including an injured State, could replace the rules of succession. He agreed with most of the critical comments that had been made by previous speakers in respect of the draft articles, especially draft article 10, dealing with succession when the predecessor State no longer existed.

In draft article 11 (1), the Special Rapporteur stipulated that, in cases of dissolution of a State, the obligations arising from an internationally wrongful act of the predecessor State "passed", subject to an agreement, "to one, several or all the successor States", thus evidently introducing the rule of succession. However, when it came to the agreement, the Special Rapporteur seemed, with good reason, to be more cautious, stipulating in draft article 11 (2) that successor States "should negotiate in good faith with the injured State and among themselves". Were new successor States — new legal persons with no legal continuity with the previous legal person, the predecessor State — actually obliged to negotiate responsibility for acts committed by the predecessor State before they had even come into being as legal persons? There might be political reasons for doing so, but as new international subjects they were not legally bound to accept any responsibility for the acts of the predecessor State. It seemed that in the case of dissolution, the general rule of non-succession should be confirmed, without any exceptions, as there was not sufficient relevant State practice.

The successor State or States and the injured State could, of course, always reach a solution by way of an agreement. In that respect, he agreed with Mr. Reinisch's conclusion that endeavouring to protect the interests of the injured State by establishing the responsibility of the successor State through application of the succession rule could result in an unacceptable rule of transfer of responsibility and attribution to a new State in respect of a wrongful act it had not committed. Responsibility for a wrongful act could not be transferred legally to a State that had not even existed as a legal person at the time the wrongful act had been committed unless it agreed to the transfer.

In his view, the Special Rapporteur's treatment of the issue of legality of succession in paragraphs 22 to 41 was useful and correct. He agreed with proposed draft article 5 which, like article 6 of the 1978 Vienna Convention, stipulated that the draft articles applied only to the effects of a succession of States occurring in conformity with international law. However, he disagreed with the views presented in the doctrine and mentioned in the report concerning legal neutrality. Under international law, all legally relevant acts were either legal or illegal. In the event of a legal lacuna, legality or illegality should be established by means of interpretation or analogy or by a court decision.

He supported the Special Rapporteur's suggestion to postpone further discussion of draft articles 3 and 4, on the relevance of the agreements to succession of States in respect of responsibility, and to deal with them only after the general rules on succession of States in respect of State responsibility had been provisionally adopted.

He had no objection to sending all the proposed draft articles to the Drafting Committee, which could deal with the various inconsistencies therein and provide the necessary terminological clarifications. The Drafting Committee should also decide, based on relevant State practice, whether all the proposed draft articles qualified as either progressive development or codification. He believed that articles 10 and 11 should either be redrafted in line with the general principle of non-succession or deleted. As currently drafted, they were not supported by State practice or legal logic.

Reviewing the draft articles in greater detail, he said that draft article 5 was an important and well drafted provision. Draft article 6 (1) and (2) confirmed the general rule of non-succession, which should be clearly presented in paragraph 1 without referring to the separate problem of attribution. He therefore proposed that paragraph 2 should become paragraph 1 and that the current paragraph 1 should be deleted. As currently drafted, paragraphs 1 and 2 referred to "the date of succession", which might be disputed, as it had been in the case of the successor States of the former Socialist Federal Republic of Yugoslavia. The date of succession was, however, important, and should at least be clarified in the commentaries. In draft article 6 (3), the "continuing character" of an act was cited as an exception to the general rule; that concept should also be clarified in the commentaries. In his view, the last phrase in paragraph 3 — "if it is bound by the obligation" — was unclear and superfluous.

Concerning draft article 7, on separation of parts of a State, he agreed with several previous speakers that it was not necessary or appropriate to use the term "secession" in the title. It was not clear what the "particular circumstances" mentioned in paragraphs 2 and 3 might be. In paragraph 2, it was unclear whether the words "will transfer" implied an obligation or simply an expectation, and he wondered whether there was any legal reason why elsewhere in the draft articles the word "pass" was used rather than "transfer". The concept of "an organ of a territorial unit of the predecessor that has later become an organ of the successor State", in paragraph 2, should be clarified in the commentaries, using the very useful and pertinent explanations presented in the report. In paragraph 3, it was necessary to clarify what was meant by "obligations ... are assumed by the predecessor and the successor State". How, and in what proportion, were the obligations arising from an act of the predecessor "assumed", and did the word "assumed" have a specific legal meaning different to "transfer" or "pass"?

Several elements of paragraph 4 of draft article 7, on the conduct of an insurrectional or other movement that led to the creation of a new State, needed to be clarified, as it was an important issue and, at least to him, one of the most intriguing possible deviations from the general rule of non-succession. He agreed with the Special Rapporteur's decision not to distinguish between different kinds of insurrection as long as they resulted in the creation of a new State, and agreed that the basis for the transfer of responsibility lay in the continuity between the insurgent movement and the eventual Government of the new State. The reasons for the distinction between "insurrectional" movements in draft article 7 (4) and "national liberation" movements in draft article 8 (3) should be explained in the commentaries.

Although its title was "Newly independent States", draft article 8 actually dealt with cases of decolonization and was, to a certain extent, in contradiction with draft article 11,

on dissolution of a State. In both cases there was a new successor State, but in draft article 8 the predecessor State still existed, while in draft article 11 it did not. In the case of draft article 8, the non-succession rule was basically confirmed, whereas in draft article 11 the rule of succession in respect of State responsibility was introduced. Paragraph 2 of draft article 8 established exceptions to the non-succession rule in a very cautious way by using wording that was not really suitable for a draft article, such as "if the newly independent State agrees" and "obligations … may transfer". Those formulations could be improved in the Drafting Committee.

Draft article 9 dealt with "cession" — the transfer of part of the territory of a State to another State. It was unclear what was meant in paragraph 3 by the wording "obligations arising from an internationally wrongful act … are assumed by the predecessor and the successor State". If it implied an obligation of the successor State to assume obligations, that would be in contradiction with paragraph 1 of the same article, since it would be a departure from the rule of non-succession.

Article 10 confirmed the rule of succession in respect of State responsibility in cases of the unification of States into a new State or the incorporation of one State into another. The Special Rapporteur distinguished between unification and incorporation, which, despite surprisingly significant legal differences, produced the same legal effect according to draft article 10: the obligations passed to the successor State. The idea of an agreement was introduced in paragraph 3 and should be introduced *mutatis mutandis* in other corresponding draft articles to confirm the subsidiary character of the draft articles.

Draft article 11 seemed to him the most disputable, particularly bearing in mind the practical case of the dissolution of the former Socialist Federal Republic of Yugoslavia, of which he had had considerable personal experience as a participant in the negotiations on succession and later as permanent representative to the United Nations in New York. At the time, the main concern had been to prevent Serbia and Montenegro from succeeding in establishing their continuity as legal persons in the United Nations. The question of whether or not there was continuity of one successor State or whether they were all equal successor States had taken 10 years and tremendous political changes to be resolved. Such matters could be very sensitive and complicated. The reasoning provided in the report to explain the idea in paragraph 1 of draft article 11 was not sufficiently persuasive. The draft article implied the introduction of the rule of automatic succession by stipulating that, subject to an agreement, the obligations arising from the commission of an internationally wrongful act of the predecessor State passed to one, several or all the successor States. Did the obligations "pass" to States that had not even existed at the time the internationally wrongful act had been committed? Hypothetically speaking, if that rule were applied in the context of a genocide committed by the predecessor State prior to dissolution against the population in the territory of its successor States, the successor States would share responsibility for the genocide simply because the predecessor State no longer existed. That would, in his view, be a denial of justice and contrary to legal logic. It should be clarified whether the obligations passed to the successor States only through an agreement or also without one.

According to paragraph 2 of draft article 11, successor States "should" negotiate, but it was not clear what would happen if they did not and no agreement was reached, and whether they were expected to negotiate only to settle the consequences of the internationally wrongful act that they had not committed or to establish whether responsibility had been passed to them. In his opinion, if draft article 11 was retained, it should be redrafted to reflect the non-succession rule by deleting the word "pass" in paragraph 1 and simply recommending that the new States and the injured State should enter into negotiations. He understood that the Special Rapporteur's intention had merely been to ensure that, in the event of the dissolution of a State, responsibility for its wrongdoing did not simply disappear. However, attempting to resolve the problem of succession of responsibility by simply shifting it to a successor State that had no legal continuity with the predecessor State seemed unjust, unacceptable and, most importantly, far from being sufficiently confirmed in State practice. He agreed with Mr. Reinisch's comments on that point.

Concerning future work, he fully agreed with the Special Rapporteur's suggestions and, given his diligence and speed, believed the Commission might indeed complete the first reading in the current quinquennium.

Mr. Hassouna said that the Special Rapporteur should ensure that all terms which required definition were included in draft article 2 (Use of terms). Given that the Special Rapporteur drew heavily on the language of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility, the Commission should pay close attention to any expansions on, or departures from, the provisions of the resolution, to ensure they were well-founded. Very careful attention should also be paid to the thorny question of categorizing instances of secession. The International Law Association had already noted the difficulties of adopting clear-cut criteria for the distinction between secession and dissolution of State when there was no agreement among the States concerned. The commentary should therefore focus on practical considerations and avoid lengthy theoretical or controversial arguments such as those to be found in paragraphs 87 and 88 of the report. Parts of the report, especially chapter IV, section D, relied heavily on European sources of State practice. The Commission should not, however, codify a general rule based solely on the practice of European States. On the contrary, in response to requests from States in the Sixth Committee, it should consider examples of succession of States following independence from colonial rule, secession or unification in Africa, Asia and the Americas. It was important to provide a comprehensive review of State practice in relation to succession of States if the Commission's work was to have worldwide relevance. He therefore seconded Sir Michael Wood's suggestion that additional information should be sought from States, or that the secretariat should be asked to prepare a memorandum on the subject.

It was unclear whether the Special Rapporteur intended to prepare two separate sets of draft articles on obligations and rights. As international legal scholars had acknowledged, many obligations were the mirror images of rights. That might explain why the 1978 Vienna Convention and the aforementioned resolution of the Institute of International Law dealt with both obligations and rights in the same articles. The Special Rapporteur endeavoured to distinguish between the rules drawn from State practice on obligations and the rules drawn from State practice on rights. If, however, the dearth of State practice presented particular challenges, it might be useful to consider State practice on rights in the context of obligations, in order to create comprehensive, well-supported draft articles encompassing the interlinked concepts of rights and obligations.

Although draft article 6 mentioned only the obligation of reparation, that limitation on the obligations deriving from the responsibility transferred to the successor State did not appear elsewhere in the draft articles. The extent of such obligations should be clarified in the text of the draft articles or in the commentary. The number of exceptions to the general rule of non-succession posited by the Special Rapporteur was so great that it was questionable whether that rule was really supported.

Despite the fact that the Commission needed to be especially responsive to the views of States on matters of succession in view of the limited success of the Commission's earlier work on other aspects of the topic, in his second report the Special Rapporteur had not addressed States' comments on the form to be taken by the outcome of the Commission's current work. While that was something which could be decided at a later stage, the Special Rapporteur must heed States' views. While many scholars and legal bodies were of the opinion that the 2001 articles on responsibility of States for internationally wrongful acts reflected customary international law, States had taken no further action on them. The Commission should therefore tread carefully when referring to them in the commentary to a topic which expanded on them.

Draft article 5 was uncontroversial as its wording was drawn from the 1978 Vienna Convention and the 1983 Vienna Convention. The clarification contained in paragraph 28 of the report that drafters of the aforementioned Conventions had not intended to establish two kinds of succession, namely lawful and unlawful, dispelled the uncertainty in that respect which had been expressed by States in the Sixth Committee, and should therefore be included in the commentary. It was unnecessary to address the possibly controversial subject of legal or illegal succession in the draft articles themselves. On the other hand, it

would be useful to specify in draft article 6 that the internationally wrongful acts covered by the draft articles were those committed by the predecessor State before the date of succession. Although that might be the logical inference which could be drawn from the reference to "acts committed before the date of succession", that clarification was essential in respect of situations of State succession where the predecessor State continued to exist.

Draft article 6 served as a general rule. Some members had questioned the relevance of rules on attribution to a topic which focused on obligations stemming from responsibility, whereas the Special Rapporteur had explained in paragraphs 48 to 50 of the report that the successor State would have significantly different obligations depending on whether an internationally wrongful act was attributed to a successor or a predecessor State. It would therefore be helpful if the Special Rapporteur could clarify the relevance of attribution to the draft articles and to distinguish clearly between attribution and obligations related to responsibility. It might be wise to consider formulating a single draft article on attribution which set out all the rules pertaining to it, including those concerning insurrectional or other movements, highlighted the different implications of the two principles for the successor State's legal obligations and emphasized that attribution played a determining role when subsequently invoking responsibility. The scope of attribution could be qualified in either the text of the draft article or the commentary.

Article 14 of the articles on State responsibility reflected the fact that a State's international obligations might require it to act or to prevent action. For that reason, draft article 6 (3) should cover breaches of international obligations resulting not only from acts but also from omissions of a continuing nature. The phrase "by an act" should therefore be deleted and the commentary should explain that international obligations could be affirmative or preventive and that the successor State's responsibility for continuing obligations of a preventive nature was without prejudice to any transfer of treaty-based obligations based on the applicable rules on the succession of States in respect of treaties. In theory, there might be two general rules on succession of States, but the general rule which would apply in reality would depend on the factual circumstances surrounding the succession of States at issue and on whether the rights and obligations flowing from State responsibility stemmed from a breach of a treaty based on customary international law obligations.

Draft articles 7 to 9 each dealt with three instances of State succession where the predecessor State continued to exist. Although secession, independence and transfer of territory were all subject to the general rule of non-succession, the Special Rapporteur identified three factors which might justify a departure from that rule: the existence of a link between the consequences of an internationally wrongful act and the territory or population of the successor State; instances where the author of the internationally wrongful act was an organ of the predecessor State and subsequently became an organ of the successor State; and instances where a newly independent State accepted a transfer of obligations arising from the internationally wrongful act of the predecessor State. The last factor was included only in draft article 8, whereas it might also be relevant to the situations for which provision was made in draft articles 7 and 9. The Special Rapporteur had not explained why no reference was made to agreements in draft articles 7 and 9, when in paragraph 93 of the report he had deemed agreements to accept obligations to be usual exceptions to the general rule of non-succession. In fact, the central role of agreements in State succession should be clarified, as it was relevant to the topic as a whole.

As draft articles 7 and 9 were worded almost identically, it might be advisable to combine them under the heading "Separation or transfer of part of the territory of a State". The commentary could then explain that those situations encompassed secession and transfer of territory. The phrase "if particular circumstances so require" was open-ended and should also be elucidated in the commentary.

Draft article 8, on newly independent States, was still relevant, since it was of historical importance for former colonies and the United Nations still maintained a list of non-self-governing territories. Moreover, the General Assembly had declared the period 2011–2020 the Third International Decade for the Eradication of Colonialism. The different principles underlying succession of States in the contexts of secession and of newly independent States should be explained in the commentary. In the case of newly

independent States which had emerged from colonial rule, succession was based on the principle of self-determination. The freedom of that State to make its own choice with regard to its succession to its predecessor's rights and obligations was of the utmost importance in the context of decolonization. The draft article could, however, be condensed by placing the contents of the second sentence of the second paragraph in the commentary and by replacing the first and second paragraphs with: "The obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State unless voluntarily assumed by the successor State." In the third paragraph of draft article 8, the phrase "national liberation or other movement" should be replaced with the broader term "insurrectional or other movement", which clearly encompassed liberation movements, bearing in mind the fact that paragraph (9) of the commentary to article 10 on State responsibility referred to the "wide variety of forms which insurrectional movements may take in practice", citing, among the examples, an anti-colonial struggle or the action of a national liberation front.

The Chair invited Mr. Hassouna to complete his statement at the following meeting in order to allow time for representatives of the Council of Europe to address the Commission and to answer any questions which members might wish to put to them.

Cooperation with other bodies (agenda item 14) (*continued*)

Visit by representatives of the Council of Europe

The Chair welcomed the representatives of the Council of Europe, Ms. Kaukoranta, Chair of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law and Treaty Office Division and Secretary to CAHDI, and invited them to address the Commission.

Ms. Kaukoranta (Council of Europe) said that the Committee of Legal Advisers on Public International Law was composed of the legal advisers of the ministries of foreign affairs of the 47 Council of Europe member States and the representatives of 9 observer States and 10 participant international organizations. One of those organizations was the Asian-African Legal Consultative Organization (AALCO), which had recently been granted participant status and whose Secretary-General had attended the fifty-fifth meeting of the Committee in March 2018. That was a highly important development, in that for the first time an organization representing States from Asia and Africa had a voice on the Committee. The Committee provided a forum for coordinating, discussing and providing advice on ideas which were crucial to the development of international law. It likewise fostered cooperation and collaboration between the Council of Europe and the United Nations and maintained a dialogue with international courts.

CAHDI contributed to the development of public international law *inter alia* by examining reservations and declarations subject to objection in its capacity as the European Observatory of Reservations to International Treaties. The reservations dialogue offered States which had formulated a problematic reservation the opportunity to clarify its scope, to modify it or to withdraw it, and enabled other delegations to understand the rationale behind a reservation before formally objecting to it. She noted that States were once again tending to subordinate treaty provisions to their domestic law and to make greater use of reservations and declarations as a means of signalling their non-recognition of another State or reaffirming the existence of a territorial dispute. Both practices undermined the basic rules of treaty law and impeded the implementation of the standards and rules contained in conventions. CAHDI and the relevant entities of the United Nations should join forces to discourage such practices. The Commission's *Guide to Practice on Reservations to Treaties* was of great assistance to CAHDI, which had examined 19 potentially problematic reservations and declarations.

CAHDI likewise participated in the drafting group on the place of the European Convention on Human Rights in the European and international legal order. The drafting group had been set up in 2016 by the Committee of Ministers to examine the challenges of the interaction between the Convention and other branches of international law, including international customary law; between the Convention and other international human rights instruments to which Council of Europe member States were party; and between the

Convention and the legal order of the European Union and other regional organizations. The aim of that work was to preserve the efficiency of the treaty system and to avert the risk of fragmentation of human rights protection in the European and international legal areas as a result of diverging interpretations.

Traditionally the focus of the Committee's efforts to promote the peaceful settlement of disputes had been on securing States' acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of the Statute of Court. At its previous meeting, CAHDI had widened the scope of its deliberations to include other declarations recognizing the Court's jurisdiction, the case law of the International Tribunal for the Law of the Sea, inter-State arbitration and other instances of peaceful settlement of disputes between States.

A number of the Committee's current projects related to various aspects of immunity and might be of interest to the Commission. One concerned the settlement of disputes of a private nature to which an international organization was a party. The immunity of international organizations often prevented individuals who had suffered injury owing to the conduct of an international organization from bringing a claim before a domestic court. That immunity was being challenged on the grounds of its alleged incompatibility with the right of access to justice. The Netherlands had prepared a preliminary document based on States' replies to questions, which examined that issue in the context of peacekeeping and police operations.

CAHDI had also prepared a legal opinion on Parliamentary Assembly recommendation 2122 (2018), on jurisdictional immunity of international organizations and the rights of their staff. That opinion had rested on two main lines of reasoning. On the one hand, the privileges and immunities of international organizations served the legitimate purpose of protecting their independence, which was essential for the effective performance of their functions. On the other hand, given that the Council of Europe was responsible for setting international human rights standards and promoting the rule of law at all levels, it had a special duty to offer its staff timely, effective and fair justice. In that respect, it was settled case law of the European Court of Human Rights that in determining whether, under the European Convention on Human Rights, it was permissible to grant international organizations immunity from the jurisdiction of national courts, the key factor was whether "reasonable alternative means" were available to effectively protect the rights of applicants. CAHDI would be preparing another legal opinion at its September meeting, on the legal challenges related to hybrid war and human rights obligations.

The Declaration on Jurisdictional Immunities of State-owned Cultural Property was a non-legally binding document developed within the framework of CAHDI. It expressed a common understanding of *opinio juris* concerning the fundamental rule that a certain kind of State property — cultural property on exhibit — enjoyed immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing the Declaration, a State recognized the customary nature of the relevant provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which had yet to enter into force. The Declaration had been signed by 20 ministers of foreign affairs of member and non-member States of the Council of Europe.

The input of CAHDI to discussions on topical issues of public international law was not limited to debate at its biannual meetings. Between meetings, evidence was collected from delegations concerning State practice on topics under consideration. Such data had already served as the basis for several publications, and a publication on immunities of special missions was being finalized. In 2013, CAHDI had agreed to prepare a questionnaire aimed at establishing an overview of legislation and specific national practices in the field of special missions. Replies had been received from 37 member and non-member States of the Council of Europe. Special missions sent by one State to another played an important role in international diplomacy, but the international law governing them remained somewhat uncertain. Determining whether a special mission had been established had direct implications for the immunities enjoyed by the members of such missions, including immunity from arrest and criminal jurisdiction. In that regard, she would like to express her appreciation to Sir Michael Wood and to Mr. Andrew Sanger, of the University of Cambridge, for preparing an analytical report based on the replies

received from States. Such initiatives illustrated the contribution that CAHDI made to disseminating the standards set out in United Nations conventions and to fostering ever closer cooperation and collaboration between the Council of Europe and the United Nations.

CAHDI attached fundamental importance to collaboration with the International Law Commission, given their shared goal of promoting the role of public international law in international relations. Input from the Commission to the work of the Committee was always welcome.

Ms. Requena (Council of Europe) said that the four priorities set by Croatia, as chair of the Committee of Ministers of the Council of Europe, were the fight against corruption, the efficient protection of the rights of national minorities and vulnerable groups, decentralization in the context of strengthening local government and self-government, and the protection of cultural heritage and cultural routes.

Within the Council, there had been various developments in the area of treaty law since the Commission's sixty-ninth session, particularly in relation to the European Convention on Human Rights. The most significant was the welcome withdrawal by the Government of France of its derogation under article 15 of the Convention on 1 November 2017, following the end of the state of emergency in that country. Although the derogation had been extended five times, the Government of France had acknowledged that a state of emergency could not remain in place indefinitely, even in the face of a continuing terrorist threat. The Government of Turkey was also expected to withdraw its derogation, which had been in place since July 2016 and extended seven times, in the very near future, leaving Ukraine as the only State with an active derogation from the Convention under article 15. The Turkish authorities had reported that all 31 decrees with force of law issued under the state of emergency had been approved by the Grand National Assembly of Turkey in accordance with article 91 of the Turkish Constitution.

Several cases concerning measures taken under the state of emergency in Turkey had reached the European Court of Human Rights. In four cases, applications had been declared inadmissible on the grounds that not all domestic remedies had been exhausted. Of a further six cases, concerning 17 journalists and media workers detained on suspicion of their alleged links with the Gülen movement and charged with criminal offences relating to terrorism, two had been adjudicated in March 2018. The Court had found violations of articles 5 (1) and 10 of the Convention but not article 5 (4). In its 2017 annual report, the Court had referred to a flood of applications lodged in the wake of the attempted *coup d'état* in Turkey, mainly in respect of journalists and judges taken into custody. More than 27,000 such applications had been declared inadmissible for failure to exhaust domestic remedies, including through the Constitutional Court and the Commission of Inquiry for State of Emergency Practices set up in January 2017. The European Commission for Democracy through Law (the Venice Commission) had adopted or was preparing several opinions relating to the state of emergency in Turkey.

The Committee of Ministers played a role in supervising the execution of judgments of the European Court of Human Rights. Four years previously, the Court had handed down a binding judgment in the case of *Ilgar Mammadov v. Azerbaijan*, finding that Mr. Mammadov's deprivation of liberty not only violated article 5 of the Convention, but also amounted to a violation of article 18, which prohibited the restriction of a Convention right for any reason other than those prescribed under the Convention. It was the first time since the entry into force of Protocol No. 14 to the Convention, in 2010, that a case of infringement had been referred back to the Court by the Committee of Ministers. A Grand Chamber had been constituted to address the question of whether a contracting party had failed to fulfil its obligation under article 46 (1) of the Convention, but an issue of impartiality had arisen: the President of the Court, Mr. Guido Raimondi, had made reference to the case in his speech at the opening of the Court's judicial year, which the Azerbaijani authorities had considered an indication of partiality. Mr. Raimondi had accordingly withdrawn as President of the Grand Chamber.

The Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data had been finalized and would be opened for signature in November 2018. In order to avoid any delay in its entry into force, it contained

final clauses providing for a degree of provisional application five years after it was opened for signature.

Conventions of the Council of Europe were open to accession by non-member States, and the number of non-member State accessions increased every year. Since the Commission's last session, there had been 30 accessions and signatures by 22 non-member States.

The fifth annual report of the Secretary-General of the Council of Europe, published in May 2018, focused on the state of democracy, human rights and the rule of law, and drew attention to a growing trend towards challenging judicial independence. Member States were increasingly seeking to exert political influence on judicial appointments, including the appointment of the President of the European Court of Human Rights. Some were challenging the primacy of the Convention or refusing to implement the Court's judgments for political reasons.

One of the strategic areas set out in the Council's Gender Equality Strategy for 2018–2023, adopted in March 2018, was the protection of the rights of migrant, refugee and asylum-seeking women and girls. Its Counter-Terrorism Strategy for 2018–2022, adopted in July 2018, had three main aims: preventing terrorism, prosecuting terrorists, and protecting persons and assisting victims. In the face of new threats to the rule of law in cyberspace, a protocol to the Convention on Cybercrime was being prepared. Evidence relating to cybercrime was increasingly stored on servers in foreign, multiple, shifting or unknown jurisdictions, but the powers of law enforcement were limited by territorial boundaries. It was hoped that the protocol would be ready by December 2019.

Sir Michael Wood drew attention to the welcome judgment of the Court of Appeal of England and Wales in *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*, handed down earlier that day, in which the Court had recognized a rule of customary international law obliging States to grant immunity to members of special missions accepted and recognized as such. The ruling drew heavily on the output of CAHDI and the Commission, particularly in the areas of immunity and the identification of customary international law, and demonstrated the value of the work of those bodies in assisting domestic courts.

Mr. Reinisch said that, in his experience, the Declaration on Jurisdictional Immunities of State-owned Cultural Property had played an important role in a number of domestic cases. The interesting tendency of domestic courts to treat it as a quasi-binding instrument could have a bearing on the topic of identification of customary international law, which was part of the Commission's current programme of work. He asked whether the relevant information on domestic court practice being gathered by CAHDI would be made available on its website, as useful potential evidence of *opinio juris*.

Ms. Requena (Council of Europe) said that the information received from States would remain confidential for the time being, as CAHDI working documents, although access could be granted to members of the Commission. In due course, it was quite possible that the information would be circulated more widely, subject to the relevant consents.

The Chair said that the level of interest among States in the work of CAHDI, as evidenced by the large number of replies received to its questionnaire on immunity, was encouraging. It was also interesting to note that Council of Europe conventions were ratified by non-member States from as far afield as Latin America, Africa and Asia.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that, in order to take into account the availability of special rapporteurs, the Bureau had had to propose several changes to the programme of work. Having highlighted the changes, he took it that the Commission agreed to approve them.

It was so decided.

The meeting rose at 1 p.m.

Provisional

For participants only

21 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3434th meeting
Held at the Palais des Nations, Geneva, on Friday, 20 July 2018, at 10 a.m.

Contents

Succession of States in respect of State responsibility (*continued*)

Programme, procedures and working methods of the Commission and its documentation (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of succession of States in respect of State responsibility (A/CN.4/719).

Mr. Hassouna, continuing the statement he had begun at the previous meeting, said that in paragraphs 138 to 145 of the second report, which dealt with the transfer of part of the territory of a State, the subject of draft article 9, the Special Rapporteur did not address the possibility of cession whereby a State agreed to transfer part of its territory to another State without the consent of the territory's population. Such a situation might also be called expulsion and might become an issue of increasing importance with respect to existing non-self-governing territories. International law, as presented in the report, did not prescribe any limits on the right of a State to cede its territory. In the context of forced cession, that would reveal the basic tension between territorial sovereignty and self-determination in international law. While most of the law of State succession focused on territorial sovereignty, the Commission would be right to underscore the fundamental principle of self-determination in that context.

Draft articles 10 and 11 reflected situations of State succession where the predecessor State no longer existed. In such cases, the application of the general rule of non-succession would lead to the inequitable result of no State incurring obligations of responsibility; accordingly, that rule should not apply. The Special Rapporteur submitted that the general rule of non-succession should be replaced by a presumption of succession in respect of obligations arising from State responsibility. However, that presumption was not reflected in draft articles 10 and 11. The Drafting Committee should consider whether to phrase those draft articles as definite rules, subject to agreements or subject to a presumption of succession. Additionally, it might be appropriate to clarify, either in the text of the draft articles or in the corresponding commentaries, that those draft articles applied to situations where the predecessor State no longer existed.

With regard to draft article 10, the Special Rapporteur explained that the title of draft article 10, "Uniting of States", encompassed situations of unification, as described in paragraph 1, where two or more States came together and formed a new successor State, and instances of incorporation, as described in paragraph 2, where a State merged with an existing State. While the phrase "unification" was used throughout the report, specifically in paragraphs 149 to 156, paragraph 1 of draft principle 10 referred instead, more generally, to States that united. In order to distinguish between cases of "unification", which the Special Rapporteur intended to cover in the situations addressed in paragraph 1, and "uniting of States", as a broader term, the paragraph should be revised so as to refer to "unification of States."

The intent behind draft article 10 (3) was not clear. In the first instance, it appeared to reiterate the entitlement of States to set up self-contained regimes that took precedence over the general rules. The only limits to that entitlement were the same as those that applied to any *lex specialis*, namely, as expressed in the commentary to article 55 of the articles on responsibility of States for internationally wrongful acts, that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law ... the special rules in question [must] have at least the same legal rank as those expressed in the articles". That fact could be alluded to briefly in the commentary, as it was an undisputed principle of international law. If, however, the purpose of draft article 10 (3) was to emphasize the necessity of consent by the injured third State, then the paragraph could be redrafted with that in mind, or it could perhaps be moved to the commentary.

Draft article 11 dealt with the dissolution of States, an area in which State practice was even more highly case-specific. The Commission should therefore be wary of drawing general rules. The example of the United Arab Republic, discussed in paragraph 170,

showed that issues relating to State responsibility after dissolution were dealt with satisfactorily through bilateral agreements. The Special Rapporteur acknowledged as much in paragraph 187, where he stated his intention to underline the role of agreements. However, the phrasing he had chosen to preserve the role of agreements in paragraph 1 of draft article 11 raised a potential problem: while the paragraph correctly emphasized that the agreement between the predecessor State and the successor States determined how the obligations were passed, it offered no way forward in the case of non-agreement and might even be interpreted as allowing predecessor and successor States to agree among themselves, and without the agreement of the injured States, to render the obligation moot. While the Special Rapporteur's decision to emphasize the centrality of agreements in that area of succession was correct, given the scarcity of State practice, the purpose of such draft articles must also be to provide default rules in case of failure of the special regime; indeed, an African State in the Sixth Committee had expressed just such a view. To avoid an interpretation that denied the possibility of residual application of the general rules contained in the draft articles in the case of non-agreement, the term "subject to an agreement," should be clarified. In addition, the paragraph could be made clearer by replacing the phrase "one, several or all the successor States" with "the State or States concerned".

Paragraph 2 adequately captured the need to negotiate in good faith. If the Drafting Committee chose to retain paragraph 1, the opening phrase of the first sentence could be shortened to read: "When a State dissolves into two or more successor States,". Another possible improvement to paragraph 2 would be to clarify the catch-all words "other relevant factors". Paragraph 189 identified some relevant factors and proposed addressing more relevant factors at a later stage. Only two of those factors were listed in the draft article itself; more factors should be included, either in the draft article or in the commentary, to provide better guidance to States.

Finally, concerning future work on the topic, the Special Rapporteur should continue to pursue a flexible approach with respect to the transfer of rights or claims of an injured predecessor State to the successor State. The Special Rapporteur could also consider drafting model clauses to be used as a basis for negotiation of agreements on succession in respect of State responsibility, or compiling an annex of contemporary dissolution of State agreements. Attention should be paid to the role of succession agreements, the prevalence of which continued to be a significant element of State practice in the context of the topic. Lastly, noting that States in the Sixth Committee were split on whether work on the topic should address international organizations, he said that he would welcome the Special Rapporteur's comments on how he planned to proceed in that regard in future work.

In conclusion, he wished to thank the Special Rapporteur once more for an excellent second report. In the light of the different views expressed in the discussion, he supported the referral of all seven draft articles to the Drafting Committee.

Mr. Huang, after thanking the Special Rapporteur for his second report on the topic, said that he wished to address a matter of concern that deserved the close attention of the Commission, namely the replication in the report of the work of academic institutions such as the Institute of International Law. While some colleagues had already touched upon the issue indirectly in their statements, he intended to be more direct in his comments.

The topic, which addressed two highly complex and sensitive issues, namely State succession and State responsibility, was a difficult one. The biggest difficulty lay in the scarcity of relevant State practice. To make up for that scarcity, the Special Rapporteur referred extensively in his report to legal writings and research outcomes, citing frequently, among others, the views of Patrick Dumberry of the Graduate Institute of International and Development Studies and the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility. In fact, almost every draft article proposed by the Special Rapporteur corresponded to articles of the Institute's resolution and, in some instances, their titles and wording were almost identical. In that connection, he recalled with concern the keynote address delivered by Mr. Schrijver, the President of the Institute, at the event held in New York on 21 May 2018 to commemorate the seventieth anniversary of the Commission, at which the latter had noted that the Institute and the Commission had examined, sometimes concurrently, many of the same

topics, including the succession of States in respect of State responsibility, which was currently being considered by the Commission. He was deeply concerned as to how the Commission would be able to maintain its prestige and central position in the progressive development and codification of international law, as mandated by the General Assembly in accordance with the Charter of the United Nations, if its work relied excessively on existing outcomes of private academic groups or the international law community. While the Commission could and should refer to the jurisprudence of international courts and tribunals and the works of eminent scholars, it must never forget its uniquely central position and leading role in the progressive development and codification of international law or the fact that, as a subsidiary body of the General Assembly, not a private academic institution, its work should always be carried out in close cooperation with the political authorities of States and that actions in respect of the drafts prepared by it should be decided upon by the General Assembly.

While it was true that in his second report the Special Rapporteur did not totally neglect existing State practice, he cited very few instances thereof, relying in some cases on indirect sources, such as the works of other scholars. It could be questioned therefore to what extent the cases cited by the Special Rapporteur reflected *lex lata* with regard to succession of States in respect of State responsibility and, further, whether it was possible to produce, on such a basis, some generally applicable rules of customary international law. In fact, the Special Rapporteur himself admitted that State practice in that field was diverse and context-specific, involving historical, cultural and political factors, and that seemingly identical cases might be driven by entirely different logic and considerations.

Moreover, the State practice cited in the report did not adequately support the Special Rapporteur's arguments developed therein. For example, the report referred to many decisions by the European Court of Human Rights. Yet those decisions were not immediately related to the succession of States in respect of State responsibility as they dealt with the legal relationship between States and private individuals and touched upon the civil liabilities of the former towards the latter. What the Commission was discussing in the context of the current topic was the legal relationship between States and the responsibility of one State to another State arising from internationally wrongful acts. Different legal systems and rules were involved. A case in point was that of *Bijelić v. Montenegro and Serbia*, which was cited in paragraph 62 of the report. What that case had actually involved was the transfer of State civil liability to a private individual rather than the succession of State responsibility. In the same vein, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, referred to in paragraphs 179 to 183 of the report, could hardly vindicate the Special Rapporteur's views, since the International Court of Justice had held that the Federal Republic of Yugoslavia had not been bound by the Convention on the Prevention and Punishment of the Crime of Genocide; it had thus offered no guidance on the succession of State responsibility.

Apart from State practice, *opinio juris* in that regard also deserved attention. The Special Rapporteur listed some facts pointing to successor States' taking over the responsibility of reparation of the predecessor States, without dwelling on the legal position of the former in that process, which was however the core element of *opinio juris*. The simple act of taking over the responsibility of reparation of a predecessor State might reflect a voluntary decision of the State concerned or its reluctant acceptance of a decision of an international tribunal. It was not possible to deduce directly that such act was based on an *opinio juris* regarding the rules of the succession of State responsibility on the part of the successor State. In some instances, the States in question did not believe that they were required to assume the State responsibilities involved but for various reasons did so unwillingly. The existence of *opinio juris* regarding the rules of the succession of State responsibility could be questioned in such cases. For example, in the *Lighthouses* arbitration, referred to in paragraph 142 of the report, Greece had in fact assumed State responsibility on behalf of the Ottoman Empire based on its obligation to follow the arbitration decision. With regard to the dispute between Viet Nam and the United States of America cited in paragraph 155, as had been clarified by Mr. Nguyen at an earlier meeting, it involved what was essentially a political agreement between the two States, and was

irrelevant to the issue of succession of State responsibility; much less could it be seen as exemplifying *opinio juris* on rules of State succession.

Turning to the draft articles themselves, he said that paragraph 1 of draft article 6 appeared to reaffirm the general rule of non-succession, a position that he supported. However, although the Special Rapporteur acknowledged the general rule of non-succession, he deviated greatly from the principle of non-succession in elaborating the various scenarios of succession, most notably in draft articles 10 and 11. When addressing the issue of succession in situations involving State unification and State dissolution, the Special Rapporteur discarded the principle of non-succession entirely, probably having been overwhelmed by the resolutions of the Institute of International Law. He disagreed with the view set out in paragraph 2 of draft article 6, which addressed the succession to State responsibility resulting from internationally wrongful acts of a continuous nature. For him, from the time the internationally wrongful act happened until State succession occurred, the act should be attributed to the predecessor State and give rise to the State responsibility of the predecessor State. Thereafter, *i.e.* following State succession, if the wrongful act continued, it should be attributed to the successor State that had obtained new legal personality, starting from the moment of succession, and give rise to the State responsibility of the successor State proper; in that scenario, the State responsibility of the predecessor State should not simply be transferred to the successor State. It was evident in that case that, although the State succession occurred, it did not trigger succession to State responsibility.

Draft article 10 dealt with succession to State responsibility in situations of State unification and was based on four cases involving the United Arab Republic, Viet Nam, the United Republic of Tanzania and Yemen, respectively. As expressly stated in paragraph 156 of the report, in the cases involving the United Republic of Tanzania and Yemen, it was impossible to find statements on behalf of the predecessor States with regard to succession to State responsibility. In the other two cases, bilateral agreements between the United Arab Republic and France, on the one hand, and between Viet Nam and the United States of America, on the other, had formed the basis of transfer of State responsibility. Combined, the four cases did not demonstrate any deviation from the general rule of non-succession in situations of State unification. Therefore, he agreed with some members that draft article 10 was not ripe for submission to the Drafting Committee.

He shared the doubts expressed by many members regarding draft article 11, which addressed situations of State dissolution where the rule of succession replaced entirely the general rule of non-succession. In the analysis set out in paragraphs 168 to 184 of the report, four cases were cited involving the Union of Colombia, the United Arab Republic, Czechoslovakia and the former Yugoslavia. In those cases, agreements had been reached between the predecessor States and the successor States under which the latter took over the State responsibilities of the former. The question that arose was whether the succession to State responsibility derived from agreements or whether, as claimed by the Special Rapporteur, the existence of an exception to the general rule of non-succession gave rise to the succession to State responsibility. It seemed to him that logic pointed to the former scenario. He recalled in that connection that, in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had held that Slovakia should succeed Czechoslovakia in terms of the rights and obligations of the project on account of the special agreement concluded between Hungary and Slovakia rather than based on any rule of succession to State responsibility. He would argue that, if a rule of exception to non-succession were to exist, the successor State would take over the State responsibility of the predecessor State out of the belief that it was required by such rule to do so. However, the aforementioned four cases demonstrated in essence that the successor States took over the State responsibilities of the predecessor States of their own will rather than out of a belief that certain rules required them to do so. There was a clear distinction between the two situations; they should not be confused.

In conclusion, with the exception of draft articles 10 and 11, he agreed that the draft articles should be submitted to the Drafting Committee.

Mr. Grossman Guiloff, after thanking the Special Rapporteur for his second report, said that he first wished to offer some general comments. The codification and development

of international law was of fundamental importance and, as stated by the Special Rapporteur, it required realistic and flexible approaches. He agreed that any solution must respect the *pacta tertiis* rule and that legality of succession must be dealt with at the current early stage, particularly because State succession was a rare occurrence. In line with article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties, the effects of a succession of States that had occurred in conformity with international law must be recognized. He agreed, however, with the concern voiced by Mr. Reinisch, that the Commission should be careful not to grant a position of privilege to unlawful situations of succession, in the sense that the limited scope of the draft articles should not be interpreted in a way that would restrict the international responsibility of States or subjects that had acted against international law.

The general rules were needed so that the non-succession principle and its exceptions could be applied to situations of internationally wrongful acts where succession had occurred. The two categories alluded to in the report, namely internationally wrongful acts where the predecessor State remained in existence and internationally wrongful acts where the predecessor State had ceased to exist, should be clearly described. Greater clarification was needed to ensure that the proposed draft articles would be properly understood. The Special Rapporteur should also elaborate further on the degree of responsibility applicable in all situations and clarify the nature and role of the "particular circumstances" mentioned in draft articles 7, 8 and 9, including the degree of State responsibility and the binding effects. Likewise, disputes among States must be resolved in accordance with international law and, when appropriate, taking account of the need for justice, as stated in Article 2 (3) of the Charter of the United Nations. As many speakers had already noted, negotiation among States must take place in good faith. In analysing the conclusions drawn by the Special Rapporteur, the Commission would be on safe ground if it followed the 1969 Vienna Convention on the Law of Treaties, the norms of State responsibility and other important normative contributions from the work of the Commission.

Turning to the draft articles themselves, he said that he supported draft article 5, considering it to be in conformity with international law, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. He also generally agreed that the Special Rapporteur's analysis of the legality of succession should be followed.

He appreciated the Rapporteur's diligent effort in stating the general rule on non-succession in draft article 6. He understood paragraph 1 to mean that any internationally wrongful act committed by a State before the date of succession would always be attributed to that predecessor State. However, he agreed with other colleagues that the wording should be revised to fully clarify the Special Rapporteur's meaning and intention. Paragraph 1, which seemed to reflect what was stated in paragraph 45 of the report, namely that "every internationally wrongful act of a State entails international responsibility of that State", seemed somewhat redundant because, if the internationally wrongful act had occurred before succession, it could be said to be irrelevant to the act of succession itself, and thus the wrongful act would always be attributed to the predecessor State. Paragraph 2 clarified the relation to succession by stating that, in the event that the predecessor State continued to exist, "the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act". If his intention was to address a situation where a predecessor State remained in existence after the succession had occurred, the Special Rapporteur might consider merging paragraphs 1 and 2. As Mr. Hmoud had suggested, the Special Rapporteur should produce a clear and direct draft article that expressly provided for the rule of non-succession, as a general rule, and not only for situations of a continuator State.

Draft article 6 (3) could be interpreted as allowing an exception to the general rule of non-succession when the successor State continued an internationally wrongful act begun by the predecessor State. Further clarification was required either in the text itself or in the commentary. Additionally, a more accurate example of a continuous act in the case of disappearances could be provided than the *Blake v. Guatemala (Merits)* case mentioned. In

that case, the Inter-American Court of Human Rights had considered that Mr. Blake's disappearance and death had occurred before Guatemala had ratified the American Convention on Human Rights. The Court had therefore adjudicated responsibility to Guatemala not on the basis of a continuous act committed against Mr. Blake, but rather in the context of the wrongful acts committed towards the family. It had stated that Guatemala should:

> "Make full reparation to Nicholas Chapman Blake's next of kin for the grave material and moral damage suffered as a result of the multiple violations of rights protected by the Convention and the enormous expenses incurred by the victim's relatives to establish his whereabouts and identify those responsible for his disappearance and its subsequent concealment."

It had also resolved that:

> "The acts of deprivation of Mr. Blake's freedom and his assassination were completed in March 1985, that those events could not *per se* be considered to be of a continuing nature, and that the Court was incompetent to decide on the State's responsibility for those acts."

Accordingly, it would be more appropriate if the Special Rapporteur were to cite article 17 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance and article II of the Inter-American Convention on Forced Disappearance of Persons.

Unless the Special Rapporteur could explain the reason for its inclusion, he would recommend that draft article 6 (4), which could be read as a preface to the following articles, should be omitted, to avoid confusion. If it was retained in a modified version, he concurred with Mr. Aurescu that the interaction between responsibility, reparation and damage should be harmonized and better explained. The report mentioned only that an injured State might claim reparation for damages suffered that resulted from an internationally wrongful act committed by the predecessor State.

Draft article 7 provided clear direction for States in respect of separation of parts of a State, and he welcomed the description of the exceptions to paragraph 1 provided in paragraphs 2 and 3. Paragraph 4 could be interpreted as saying the same as draft article 8 (3); the Special Rapporteur should therefore consider striking paragraph 4 from draft article 7 and including secession or separation of territory under draft article 8 (3).

In connection with draft article 8, on "newly independent states", he agreed with Sir Michael Wood that draft article 2, on use of terms, should include the definition of that term contained in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of State in respect of State Property, Archives and Debts. Consent was very important to the stability of international law because a State should not be punished for the acts of another State. It was also important under draft article 8 that a former colonized State should not be punished for the internationally wrongful acts of the former colonial power, following the principle of *tabula rasa*. Lastly, in draft article 8 (3), care should be taken in respect of the inclusion of insurgents under the umbrella of "other movements", as noted by the Special Rapporteur in paragraph 112 of the report.

On the transfer of part of the territory of a State, draft article 9 (1) set forth the general principle of non-succession in that context, while exceptions to the general rule of non-succession were laid out in paragraphs 2 and 3. While he would like to see an explanation of the expression "if particular circumstances so require", he agreed with the substance of the article. In paragraph 3, the Special Rapporteur should elaborate on the concept of "direct link", wording that was also used in draft article 8 (2), in order to avoid any confusion as to the type of link that could be classified as "direct". Some of those concerns might be better addressed in the commentary.

Draft article 10 reflected a clear provision of international law. He agreed with the Special Rapporteur that, in the event of a union and the formation of a new successor State, an internationally wrongful act of any predecessor State should pass on to the new successor State. He did not consider it necessary to elaborate on State practice, given its

limited use in that context. Prior to unification, it was up to the States to perform due diligence and understand the international obligations that would arise from internationally wrongful acts that had been committed previously. He therefore agreed that the obligations would remain unless the successor State received the consent of the injured State, as provided for in draft article 10 (3). He recommended retaining proposed draft article 10 in its current wording for the Drafting Committee.

He considered draft article 11 to be the most contentious of the draft articles, since it concerned only the situation where the predecessor State had ceased to exist. Paragraph 1 deviated from the general rule on non-succession set out in draft article 6 and replaced it with a general rule of succession in cases of dissolution. Clarification was needed of the phrase "subject to an agreement" so as to indicate whether the obligation of an internationally wrongful act passed to the successor State because it had agreed to assume the obligation or whether it passed automatically, with or without an agreement, the "agreement" in the given context referring to the apportionment of the obligations among the successor States. If the former applied, then the phrase would be in conformity with the general rule of non-succession and *pacta tertiis*. If the latter meaning was intended, there would have to be negotiations between the successor States and the injured State. State practice tended to support the former. For example, the successor States of Gran Colombia in 1831, of the United Arab Republic in 1961 and of Czechoslovakia in 1993 had agreed to assume the obligations. As Mr. Reinisch had highlighted in his statement, requesting compensation from the successor State relied "solely upon the ground that the obligation to indemnify for such losses rested upon the country within which the injury was inflicted". Other members of the Commission had offered valid criticisms in respect of whether the obligation could pass with or without an agreement, but he remained convinced that the transfer of obligations in the absence of an agreement should remain in the text and be further clarified either in the commentary or by the Special Rapporteur.

The terms "good faith" and "equitable proportion" in draft article 11 (2) needed clarification, the latter appearing to limit the meaning of "good faith" during negotiations. In paragraph 189 of the report, the Special Rapporteur stated that "in cases where no territorial link exists, the distribution of the obligation of reparation (in particular, compensation) may follow the equitable proportion used for distribution of State property and debts". As he understood it, the Special Rapporteur intended "equitable proportion" to have the same meaning as in the 1983 Vienna Convention.

He agreed with Mr. Hmoud that it would be preferable to revise draft articles 10 and 11 using the underlying general rule of non-succession rather than a presumption of succession. As Mr. Hmoud had suggested, attribution remained a cardinal element for assumption of responsibility for the wrongful act by the wrongdoer and for that wrongdoer to assume the consequences. He would be reluctant to deviate from the general rule of non-succession solely to force a State to pay damages to an injured party. He remained unconvinced that the Special Rapporteur valued the rule of non-attribution. State practice supported the general rule on non-succession, which had led to injured States entering into bilateral agreements on voluntary compensation. He therefore recommended that the Special Rapporteur should elaborate further on the rule of non-attribution.

He supported the idea that it was essential to focus on general rules as well as issues related to transfer of obligations. The general rules constituted a coherent whole with the draft articles and provided important opportunities for a constructive and interactive dialogue with the Sixth Committee.

In conclusion, he supported sending all the draft articles to the Drafting Committee, taking account of the different comments made.

Mr. Nolte said that he wished to congratulate the Special Rapporteur on his report, which was excellently researched and well argued, and would provide valuable guidance for the future work of the Commission on the topic.

The debate on the topic within the Commission at its seventieth session had already been very rich, so much so that the Commission was under considerable time pressure. He would therefore not address the report and the proposed draft articles comprehensively.

Instead, he would focus on one specific case and one draft article, before indicating his position on the other draft articles by associating himself with previous speakers.

In his statement the previous day, Mr. Petrič had said that the Special Rapporteur, in proposing draft article 10, entitled "Uniting of States", had relied too heavily on a single case study, namely the reunification of Germany. Indeed, in the report, the case of Germany was invoked as the primary precedent for proposing draft article 10, which reversed the traditional rule of non-succession and postulated a rule of succession for cases of unification in which a predecessor State ceased to exist.

It was worthwhile assessing the case, as a closer look at the sources quoted in the report demonstrated that the reunification of Germany did not support draft article 10. Rather, the sources pointed in the opposite direction. In paragraph 160 of the report, the Special Rapporteur quoted a judgment of the German Federal Administrative Court. He asserted that the judgment "provides an exception to the traditional approach of non-succession". However, first of all, the judgment confirmed the traditional rule of non-succession in strong terms by mentioning a constant jurisprudence of the Federal Constitutional Court of Germany and "unanimity among authors" to the effect that a successor State was not responsible for the internationally wrongful acts of a predecessor State that no longer existed. Only after recognizing the traditional general rule of non-succession, which went squarely against proposed draft article 10, did the Court acknowledge a very limited exception by stating that pending claims for compensation for expropriations did pass to the successor State. The sources cited by the German Federal Administrative Court in support of that limited exception confirmed the point made by Mr. Reinisch, namely that the obligation to pay compensation for expropriation did not arise from succession to State responsibility for wrongful acts, but from the primary obligation not to expropriate without adequate compensation. In short, the Special Rapporteur invoked the recognition of a very limited exception to the traditional approach of non-succession in order to support a much broader rule, so that the exception would come to engulf the rule. In his view, that was not how the traditional approach of non-succession could be overcome.

As a result, proposed draft article 10 could not be based on that particular element of State practice. In fact, it ran counter to that practice. Moreover, the Federal Republic of Germany had not otherwise recognized its responsibility for internationally wrongful acts committed by the German Democratic Republic, other than on the basis of a specific agreement. Other cases of unification mentioned in the report did not support draft article 10, either. The case of the United Arab Republic, which was cited in paragraph 153 of the report, concerned only agreements on expropriations, which did not fall into the category of internationally wrongful acts. The cases of Yemen and the United Republic of Tanzania supported only the proposition that no automatic succession of obligations took place, since the statements of the respective States had been limited to treaties.

The analysis of State practice on unification led to a more general point: it was one thing to say that there was very little and diverse practice, and that doctrinal and policy considerations should therefore play a greater role; it was another to go against the available State practice and say that an exception to such practice was the rule.

Were there not at least good policy reasons for the Special Rapporteur's proposal, in draft article 10, to depart from the traditional rule of non-succession? He had his doubts. To arrive at such a conclusion would first require a consideration of the reasons why successor States, in cases of unification, had, in the past, not accepted responsibility for the internationally wrongful acts of predecessor States that had ceased to exist. Looking at the cases of Germany, Viet Nam and Yemen, but also at the possibility of Korean reunification, it became plausible that the reasons for such refusals did not lie simply in a desire not to be held responsible. Rather, successor States did not — with good reason — find it acceptable to be burdened with claims related to the internationally wrongful acts of another State, to which they had not contributed, from which they had not benefited and which they might rightly consider "odious". To be burdened with such claims might be a serious impediment to a process of unification that could be in the interests of international peace and security. The unification of States typically took place when a predecessor State was in great difficulty, possibly after having committed serious violations of international law. In those

circumstances, the unification of two States might be the only politically practicable way of resolving a critical situation to which other States also wished to see a peaceful resolution. A unification was often not simply a source of enrichment for the successor State. In fact, it could create a huge economic burden that the envisaged successor State might hesitate to assume, and that might become unacceptable if it brought with it responsibility for internationally wrongful acts considered "odious". The prospect of being the successor to violations of international law would not be considered just by a successor State or its population, particularly if such violations had been committed under the protective influence of a third State. It was one thing to assume responsibility for the acts of a previous regime of one's own State, as the Federal Republic of Germany had done; it was another to have to assume responsibility for the acts of a different State that might have been an antagonist in the past.

For the reasons he had outlined, neither State practice nor certain policy considerations supported the rule of succession proposed in draft article 10. It was true that there was a policy consideration that spoke in favour of passing the obligations of an extinct predecessor State to a unified State, namely that an injured State should not lose a debtor through what was, for it, an unrelated event, and that, in relative terms, a unified State typically had the closest connection to a predecessor State. Even so, that policy consideration alone could not serve as the basis for a straightforward rule, as proposed in draft article 10, if State practice and other policy considerations spoke against it. In his view, the available State practice and its underlying policy considerations permitted only the formulation of a rule or, rather, a policy recommendation, that gave a decisive role to agreements between an injured State and a newly unified successor State. He therefore proposed that draft article 10 should be reformulated so that it became subject to the agreement of a successor State, as appropriate. Paragraph 3, as it stood, did not fit the bill; far from it. Draft article 10 should thus be redrafted to read:

"Draft article 10
Unification of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State if and to the extent that the States concerned have so agreed.

2. When a State is incorporated into another existing State and ceased to exist, the obligations arising from an internationally wrongful act of the predecessor State pass to the successor State if and to the extent that the States concerned have so agreed.

3. Paragraphs 1 and 2 are without prejudice to claims of compensation for the expropriation of property."

By focusing on draft article 10 and the example of Germany, he did not wish simply to reinforce the point made by the Special Rapporteur that cases of State practice were "diverse, context-specific and sensitive". While that statement was true, it was also a bit misleading because it suggested that instances of practice were often not very helpful in the context at hand. By using the specific example of German reunification, he wished to demonstrate the importance of looking closely at instances of practice, even if they were few in number and diverse. Such instances often revealed their significance and underlying considerations only after a careful analysis.

It would be useful to explore available practice relating to the succession of States in respect of State responsibility in greater depth, as he had tried to do with the case of German reunification. That task need not necessarily be undertaken by the Special Rapporteur himself. It could perhaps be carried out by the Secretariat, which, in a study, could verify: (a) whether claims of succession in respect of State responsibility had been put forward; (b) whether such claims had been opposed by successor States; and (c) whether or not agreements had been concluded with regard to such claims in general or to a certain category of claims.

In conclusion, he agreed with previous speakers who had adopted an approach comparable to the one he had tried to illustrate by focusing on the example of Germany, including Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Nguyen, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch and Sir Michael Wood. By associating himself with previous speakers, he simply wanted to give an indication to the Special Rapporteur and others of the general perspective from which he might raise certain points in the Drafting Committee.

He recommended that all the proposed draft articles should be referred to the Drafting Committee, on the understanding — as highlighted by Mr. Hmoud — that the Drafting Committee might change the general direction of certain draft articles.

Mr. Zagaynov, noting that the topic was one of the most serious, politically sensitive and multilayered issues dealt with by the Commission, said that the Special Rapporteur had addressed many questions raised by members of the Commission and delegations in the Sixth Committee; he hoped that the current discussion would contribute to the work.

The existence or absence in international law of an established rule on the succession of States in respect of State responsibility was a basic question that had already been addressed by many previous speakers and the Special Rapporteur himself. He could not disagree with the statement in paragraph 16 of the report that "State practice is diverse, context-specific and sensitive". It seemed that most members of the Commission were of the opinion that the principle of non-succession should be followed. He agreed, however, with the Special Rapporteur that, both in doctrine and in case law, with all its limitations, it was possible to find arguments that demonstrated the diversity of approaches and suggested that there might be other answers. The commentary to the article 11 of the 2001 articles responsibility of States for internationally wrongful acts read: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory." State practice on succession since the Commission's adoption of those articles had added little of substance to clarify the situation. The Special Rapporteur mentioned only one situation from that period: the separation of Montenegro from the State Union of Serbia and Montenegro. Judicial decisions of recent years did not help either. The decision in the *Lighthouses* arbitration, the classic judgment in that context, noted that "the question of the transmission of responsibility in the event of a territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and applicable equally in all possible cases. It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors." He wondered whether the matter had developed sufficiently since then to provide such an answer.

In 2010, former Commission member Mr. Mikulka had said that "neither practice nor doctrine provide a uniform answer to the question of whether and, if so, in what circumstances, a successor State may be held responsible for an internationally wrongful act of its predecessor". That had raised doubts for many members of the Commission during the consideration of the Special Rapporteur's first report. In many respects, those factors explained the inconsistency in the conclusions and assessments in both the first and the second reports.

In 2017, Mr. Reinisch had proposed an excellent analysis of a number of examples of case law, which he had continued during the current session. It could be useful to look at them from a different perspective. In the *Lighthouses* arbitration, the tribunal had been guided by, among others, the 1923 Lausanne Peace Treaty and its protocols, under which aspects related to the succession of Greece in respect of rights and obligations under the concessionary contracts concluded with the Ottoman Government or local authorities had been definitively settled. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the responsibility of Slovakia had followed from the special agreement concluded between Slovakia and Hungary, the preamble to which mentioned that Slovakia was the sole successor State to Czechoslovakia in respect of rights and obligations relating to the Project. In the *Bijelić v. Montenegro and Serbia* case, the decisive argument for Montenegro assuming responsibility seemed to be that it considered itself to be bound in its legislation by obligations under a number of international treaties that had been in effect for

it prior to its declaration of independence on 3 June 2006. Finally, in the *Mwandinghi* case, Namibia had, in line with its Constitution, assumed responsibility for the acts of the South African Government.

He was not certain whether the examples given, which were all different, could be included as clear evidence of the existence or otherwise of a general rule on succession in respect of State responsibility. However, they would appear to confirm the importance of the relevant agreements between States or unilateral declarations in the given context. He agreed with Ms. Galvão Teles on the subsidiary character of any rules that could result from the work of the Commission. It would be worthwhile to consider including a provision to that end, perhaps based on the wording used by the Institute of International Law. It would also be possible to incorporate additional provisions indicating that priority should be given to seeking a settlement by concluding an international treaty, as had been done, specifically, in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, in which that option was considered to be of paramount importance.

Like Mr. Murase, he wondered why the proposed draft articles, in contrast to the Institute of International Law resolution, mentioned succession of States only in respect of obligations and not in respect of rights. As rights were to be considered in the third report, it would be helpful to hear from the Special Rapporteur what his plans were in that regard.

Draft article 6 provided that the responsibility of a State could be invoked by an "injured State or subject". However, in draft articles 3 and 4, the wording "another State or another subject of international law" and "injured State or subject" had been used. It would be helpful if the rationale behind the different formulations could be clarified, given that it had a direct impact on the scope of the work.

Some questions of methodology also arose. He recalled that the 2001 articles on State responsibility concerned only obligations owed to another State, to several States or to the international community as a whole and queried whether it would be right if the Commission, without having considered the matter of State responsibility in respect of other subjects of international law, were to begin to analyse succession in relation to that responsibility. As had been noted in both the first and the second reports, the Special Rapporteur planned to look at succession of States in respect of State responsibility to injured international organizations or to injured individuals in the fourth report in 2020. Perhaps that issue could be included in the current discussion, rather than waiting for the fourth report.

The Institute of International Law resolution used the wording "State or another subject of international law". However, as had been noted, the resolution covered not only the obligations of a predecessor or a successor State, but also its rights in the case of internationally wrongful acts by other States or subjects of international law. It thus addressed the responsibility of other subjects of international law as well. In the context of the current work, the Commission was limited exclusively to the topic of State responsibilities. Thus the question arose of whether it was correct to speak of State succession in respect of responsibility to other subjects of international law if the inverse situation, of succession in respect of responsibility of other subjects of international law to States, was not taken into account; in other words, whether it was correct to mention only the obligations of States but not their rights in that regard.

He therefore thought that, at the present stage, it would be best to exclude mention of other subjects or subjects of international law from the draft articles, at least until that issue had been analysed. It appeared that the approach adopted by the Commission in 2001, as expressed in article 33 (2) of the articles on State responsibility, which stated that the relevant provisions were without prejudice to "any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State" was completely reasonable.

For reasons of time, he had decided not to comment on the parts of the report concerning the end of the existence of the Soviet Union, other than to make the general comment that he did not share some of the conclusions drawn. He proposed that, as with

the assessment of the unification of Viet Nam, it would be useful to rely not only on doctrine but also on the official position of the State concerned.

He was in favour of retaining draft article 5 in its proposed wording, which reproduced the text of article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties and article 2 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. In respect of draft article 6, he wondered, like Mr. Murphy and Ms. Galvão Teles, about the appropriateness of the article's title, given its content. It would also perhaps be good to begin by calling on States to resolve issues of succession through negotiation. He agreed that the proposed wording was not ideal and should be worked on.

The possible structure of the proposed draft articles could be built around the various types of succession, such as separation of part of a State, transfer of part of a territory, uniting of States and dissolution of a State, as had been done in the 1978 and 1983 Vienna Conventions. That, in principle, was the approach followed by the Special Rapporteur. He would also propose retaining the draft article on newly independent States, with its traditional character. He agreed with Sir Michael Wood and other members that it would be useful to provide a definition of the term, since it had been used at the end of the twentieth century and at the beginning of the twenty-first century with a different meaning from its original one.

He considered that the analysis would be incomplete and selective without the provisions on dissolution of a State. If he was not mistaken, there had not been any objections to the suggestion of sending only draft article 5, draft article 6 (1) to (3), draft article 7 (1) and draft article 9 (1) to the Drafting Committee. That shortened text would represent a cardinal departure from the logic of the two reports and the Special Rapporteur's position. It would be interesting to hear what he thought about it. Perhaps the discussion would provide an opportunity to assess once again how best to approach the topic and the format to use. He wondered whether it might perhaps be a good idea to focus for the moment on a more thorough analysis of the topic and its likely development, without moving to specific wording for the draft articles, and would be interested to know whether the Commission had ever taken that approach in its previous work.

He agreed that, given the clear lack of State practice and case law, as well as the limited possibilities of relying on an analysis of doctrine, it would be a good idea to ask States for their views. The pace at which the topic was to be considered was a matter of concern in that respect, as it could have an impact on the quality of the outcome. It would be worth looking at Mr. Nolte's suggestion of asking the Secretariat to prepare a study of case law on the matter.

In conclusion he thanked the Special Rapporteur for the work he had done and wished him success in his further work. He looked forward to hearing his reaction to the discussion of the report.

Ms. Oral said that she wished to congratulate the Special Rapporteur on his well-written report, which drew on a rich variety of sources and skilfully examined an interesting topic that was not without its complexities and challenges.

Delegations in the Sixth Committee had given mixed reviews on the topic. Some States, such as Austria, China, Greece, Portugal and Viet Nam, had criticized the extreme lack of State practice, an issue that was apparent in the report and had been raised repeatedly by other members of the Commission. The State practice that was cited in the report had been criticized for being "disproportionately" drawn from European countries. Malaysia and Mexico, for instance, had underscored the need to analyse State practice from regions outside Europe.

State succession was not an everyday occurrence, so it was, to some extent, understandable that State practice should be relatively scarce. Nevertheless, the practice that existed did not readily support any general rule of succession, which the Special Rapporteur had spoken in favour of in 2017.

Consequently, the Special Rapporteur was to be commended for taking into consideration the comments of States and members of the Commission and adopting the

position that the general rule was that of non-succession of State responsibility. His approach, in not suggesting that the rule should be replaced by another, similar theory of succession, was a wise one. As pointed out by several previous speakers, the limited appeal of State succession was evident from the limited participation of States in the two Vienna Conventions on succession of States and their scant support for the Commission's work on the topic "Nationality in relation to the succession of States".

In addition, as eloquently stated by Mr. Petrič, the Commission had to be very careful about creating exceptions to the general rule of non-succession. The notion of transferring legal responsibility for a wrongful act to an entity that had not committed it raised many questions, including that of justice, as pointed out by Mr. Reinisch and Mr. Petrič.

The highly personalized nature of responsibility for wrongful acts in law in general was well established and constituted a fundamental right. To hold a person or entity responsible for acts that brought with them serious consequences, such as reparations, that could have an impact on the local population, was indeed unjust. Also, as mentioned by some previous speakers, the Commission would be creating an exception that produced an unjust result by imposing what could be onerous reparation obligations on a new State that had not committed a given wrongful act. For that reason, she understood the need for *terra firma* in law.

Although the Special Rapporteur had adopted the position that non-succession of internationally wrongful acts was the general rule, she shared the concern expressed by other members of the Commission, including Mr. Hmoud, Mr. Park and Sir Michael Wood, that, in the report, the rule was overshadowed by exceptions, which in some cases appeared to be presented not as exceptions but as alternative general rules.

That approach was hinted at in paragraph 20 of the report, in which the Special Rapporteur asserted that the first step was the determination of general rules of succession or non-succession and that such general rules were subject to exceptions and modifications. The reference to "modifications" in addition to "exceptions" implied making changes to the general rule, a point that was relevant to concerns expressed in relation to proposed draft articles 10 and 11.

She was therefore of the view that the exceptional nature of the transfer of State responsibility for the wrongful acts of a predecessor State to its successor State should be made abundantly clear in the report, the text of the draft articles and the commentaries thereto.

The Special Rapporteur put forward various grounds for exceptions to the general rule of non-succession, including the continuation of a wrongful act by a successor State, unjust enrichment and the existence of a direct link between a wrongful act and the territory where it was committed.

She questioned the use of "unjust enrichment" as grounds for an exception to the general rule of non-succession. Unjust enrichment was part of the laws of obligation and, in the simplest terms, arose when a party derived a benefit to which it was not legally entitled, to the detriment of the claimant party, and must give restitution to the injured party. Traditionally a concept of civil law related to the law of obligations, "unjust enrichment" had also been adopted by common law countries. The Iran-United States Claims Tribunal in the case concerning *Sea-Land Service, Inc. v. The Islamic Republic of Iran, Ports and Shipping Organization of Iran* had summarized the characteristics of unjust enrichment in the following manner: "There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched." In cases of State succession, it was not always simple to identify the benefit received by the successor State from the injured party. Such grounds for succession would be context-specific and should be decided on a case-by-case basis. However, that was not reflected in the current draft articles, other than by the vague phrase "if particular circumstances so require". Cases of unjust enrichment might include States that had benefited from improvements on a

territory without being able to pursue their claim against the predecessor State, but as the draft articles currently stood, that was far from clear.

The exception linked to territory, set out in draft articles 7, 8 and 9, lacked support. Indeed, the proposition that the wrongful act committed by the predecessor State should create an *in rem* obligation that passed to the new State through territory seemed almost *contra legem*, given that the wrongful act must be attributed to a State, which was a legal personality that could be dissolved by law, unlike territory. Furthermore, the expression "if particular circumstances so require", used in draft articles 7 (2) and 9 (2) and (3), was overly vague; she supported the statement made by another Commission member that the *travaux préparatoires* of the Institute of International Law on the subject "Succession of States in matters of international responsibility" also lacked clarity on the matter. She therefore proposed that the expression should be deleted and that an explanation of the particular circumstances in question should be included in the commentary.

She supported the suggestion by a Member State that the Commission might produce model clauses for States in a succession situation to use as a starting point for determining where State responsibility lay and suggested that it should be made clear that those rules were subsidiary to the general rule. Doing so might make the Commission's work on the current topic more acceptable to a wider number of States.

Turning to the specific draft articles put forward by the Special Rapporteur in his second report, she said that she supported the proposal to make draft article 6 (1) a stand-alone provision and that it should be made more explicit that it was not based on attribution. The text proposed by Mr. Nguyen provided a good starting point for the Drafting Committee, as it made very clear that the draft articles reflected a general rule of non-succession.

She agreed with previous statements that the use, in draft article 6 (2), of the discretionary verb "may" seemed to imply that there was an alternative to holding the predecessor State liable for the internationally wrongful act. She proposed that paragraph 2 should be deleted or at least revised simply to state that in the case that the predecessor State continued to exist, the draft articles were without prejudice to the right of the injured States to invoke the responsibility of the predecessor State.

She did not fully support the statement by the Special Rapporteur in his report that the traditional doctrine of non-succession in respect of responsibility came mostly from the period prior to the codification by the Commission of responsibility of States for internationally wrongful acts, and that that could partly explain the thesis of the "highly personal nature" of international responsibility, which was not transferable from a wrongdoing State to a successor State. The non-transferability of the highly personal nature of a wrongful act was a well-established tenet of law. Wrongful acts were fundamentally different, legally speaking, from the transfer of simple property or debts, as codified in the 1978 Vienna Convention on Succession of States in respect of Treaties.

Draft article 6 (3) was therefore particularly problematic, as it sought to create an exception based on the so-called continuity of the attribution of the wrongful act of the predecessor State to the successor State; the phrase "if it is bound by the obligation" in that paragraph was also unclear. The articles on responsibility of States for internationally wrongful acts provided for one circumstance of continuation of attribution — in article 10, entitled "Conduct of an insurrectional or other movement". As was explained in the commentary thereto, the basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lay in the continuity between the movement and the eventual Government; in other words, the actors were the same, only their legal status changed. The exception to the non-succession rule proposed in draft article 6 (3) drew on the *Lighthouses* arbitration, a case with a number of particularities, including the fact that Greece had been legally subrogated to the rights and obligations involved. The tribunal had stated that it could not affirm the existence of general rules of succession of States in respect of State responsibility since the issue was so contextual. A key element of the tribunal's decision to hold Greece responsible had been based on the acknowledgement by Greece of the conduct as its own. That was more in line with article 11 of the articles on State responsibility, entitled "Conduct acknowledged and adopted by a State as its own".

Consequently, the responsibility of the successor State could not be based on continuity of attribution, but would, at best, constitute a new independent breach of the successor State, even if that State had consented to the transfer of such obligation. Draft article 6 (4) was also drafted in a manner that undercut the general rule of non-succession; she proposed redrafting it to read "An injured State may only claim reparations from the predecessor State unless expressly provided for otherwise by these draft articles."

Draft articles 10 and 11 were presented in the report as new rules, as hinted at by the verb "modify" in paragraph 20. Other members of the Commission had rightly pointed out that it was an odd situation for the successor State, in the case of separation, not to incur any obligation resulting from the wrongful acts of a predecessor State if that State continued to exist, whereas in the case of dissolution, the successor State did incur such obligations. In cases of transfer of obligations deriving from a wrongful act, she agreed that the rationale that the injured State could not be left without remedy ran counter to modern principles of law. Again, that was entirely different from transfers of debts or property.

In conclusion, while she had some concerns, she would nevertheless recommend that all the draft articles should be referred to the Drafting Committee.

Mr. Ruda Santolaria said that he wished to commend the Special Rapporteur on his second report, which reflected rigorous research that relied on diverse sources, and included examples from a range of times and places in history, in response to the concern expressed that his first report was mainly focused on European cases. As he had stated at the previous session, in the light of the specific nature of the topic and of the low number of ratifications of the 1978 Vienna Convention on Succession of States in respect of Treaties and of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, the Commission's outcome might be better presented as draft conclusions rather than draft articles.

He supported draft article 5, which adequately reflected articles 6 and 3 of the 1978 and 1983 Vienna Conventions, respectively. With regard to draft article 6, the Special Rapporteur noted in the body of his report that since the predecessor State continued to exist, the continuing State should remain responsible for its own internationally wrongful acts committed before the date of succession; nevertheless, paragraphs 3 and 4 of the draft article could be interpreted to mean that the same was true in situations arising from the responsibility of successor States. A distinction was drawn by the Special Rapporteur between situations in which a State had obligations on the basis of responsibility for its own wrongful act, not as a matter of succession (transfer of obligations) from the predecessor State, and situations in which the internationally wrongful act committed before the date of succession of States by a predecessor State was still attributable to that State, in which case the possibility of invoking certain obligations of a successor State should be limited only to one of invoking reparation. The first situation brought to mind article 15 of the articles on State responsibility, entitled "Breach consisting of a composite act", in that the concept of "composite acts" referred to a situation where the wrongful act consisted not of an isolated act but of a practice or policy that was systematic in character and that the article allowed keeping the general rule of responsibility of the predecessor State if it continued to exist, while permitting the establishment of a separate attribution of acts to the successor State according to established categories. The second situation was more controversial in principle, in that even though responsibility was not attributable to a successor State, that State could have an obligation to provide reparation.

In draft article 7, he preferred the more neutral expression "separation of parts of a State", as it was used in the 1978 and 1983 Vienna Conventions, to the term "secession". He supported paragraphs 2 and 4 of the draft article, which allowed for the transfer of obligations to the successor State in certain situations, which he found acceptable; paragraph 4, specifically, reflected the content of article 10 of the articles on State responsibility, on the conduct of an insurrectional or other movement. On the other hand, he had reservations about paragraph 3, which stated that the obligations arising from an internationally wrongful act of the predecessor State, where there was a direct link between the act or its consequences and the territory of the successor State or States, were assumed by the predecessor and the successor State or States.

Regarding draft article 8, he was in favour of adding a definition for the term "newly independent State" under draft article 2; such a definition might take as its basis those provided in the 1978 and 1983 Vienna Conventions. He generally supported the content of draft article 8, paragraph 3 of which reflected the language of article 10 of the articles on State responsibility.

He supported draft article 9 (1) and (2), but had concerns, similar to those he had expressed concerning draft article 7 (3), about draft article 9 (3). It was noteworthy that the Special Rapporteur dealt specifically with cases of succession where the predecessor State had ceased to exist, laying out his reasoning in paragraph 148 of the report. He did not agree entirely with the Special Rapporteur's approach, in that successor States were subjects of international law distinct from the predecessor States, with their own legal personality; therefore, except in situations where the successor State assumed the status of "continuing State", he did not agree that the presumption of succession should replace the general rule of non-succession in respect of obligations arising from State responsibility.

Draft article 10, on the uniting of States, would benefit from further research into State practice. As for draft article 11, he supported paragraph 1, which provided for the possibility that, subject to an agreement, obligations arising from the commission of an internationally wrongful act of the predecessor State could pass to the successor States; however, he did not agree with imposing on the successor States an obligation to negotiate with the injured State in order to settle the consequences of the internationally wrong State of the predecessor State.

He was in favour of referring to the Drafting Committee all the draft articles proposed by the Special Rapporteur in his second report and agreed that further consideration by the Committee of draft articles 3 and 4, contained in his first report, should be postponed.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12) (*continued*)

Mr. Hassouna (Chair of the Working Group on methods of work) said that the Working Group on methods of work was composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood, Mr. Zagaynov and Ms. Galvão Teles (*ex officio*).

The meeting rose at 12.05 p.m.

Provisional

For participants only

14 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3435th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 24 July 2018, at 10 a.m.

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Chapter VII. Provisional application of treaties

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of succession of States in respect of State responsibility.

Ms. Escobar Hernández said that the intense debate elicited by Mr. Šturma's excellent report should not be seen as a reflection of its quality but rather of the controversial and complex nature of the topic and the fact that other institutions, such as the Institute of International Law and the International Law Association, had taken up the same topic. However, the consideration of the topic by other institutions was not sufficient reason for the Commission to refrain from doing so, nor did the fact that the Special Rapporteur had taken into account the work of those institutions in his report diminish its value. On the contrary, it would have been incompatible with the aim of preparing a serious and high-quality report to ignore those institutions' contributions, especially those of the Institute of International Law. At the same time, in its consideration of the topic, the Commission should be guided by its own mandate and role as a subsidiary body of the General Assembly of the United Nations.

The starting point for the Special Rapporteur's work on the topic had been the gap in international law arising from the fact that the Commission's articles on responsibility of States for internationally wrongful acts defined the rules for the attribution of internationally wrongful acts but made no provision for the special problems posed by the succession of States with regard to the rights and obligations arising from international responsibility. That focus had led the Special Rapporteur to begin draft article 6 with a reference to the inalterability of the rules for the attribution of an internationally wrongful act as a consequence of State succession. However, some of the proposals for possible exceptions set out subsequently in draft articles 6, 7, 8 and 9 were based, precisely, on special rules for the attribution of an internationally wrongful act that had already been set out in the articles on State responsibility and that reproduced arguments and wording that had been used by the Commission during its lengthy consideration of that topic.

Such an attempt to totally separate attribution and succession was the main problem with the analysis presented in the report and with the draft articles proposed in it. Although attribution and succession were conceptually distinct from one another, as the Commission had expressly pointed out in the commentary to article 10 on State responsibility, their separation should not be the main principle guiding the Commission's work on the topic, as that approach could not provide an adequate response to the problems arising from State responsibility in respect of succession or offer any kind of guidance to States that might face such problems in the future.

One argument that might help to clarify the situation was the fact that the attribution of an internationally wrongful act to a State was the necessary trigger for the relations which arise from responsibility and that such attribution could be determined only with regard to an existing State. It immediately followed from that argument that, with regard to succession, an internationally wrongful act could not be attributed to a State that did not exist at the time of the act. The general rule therefore had to be that there was no succession in respect of responsibility.

Yet, that was not the only possible argument. One could consider, for instance, a hypothetical situation in which internationally wrongful acts committed by an insurrectional or other movement that led to the birth of a new State were attributed to that new State, in accordance with article 10 of the articles on State responsibility, and in which other such acts, committed in the same period and in the same territory by organs or agents of the State, were attributed to the predecessor State, in accordance with articles 4 and 5 of the articles on State responsibility. Although those situations corresponded to specific rules on the attribution of internationally wrongful acts, she was not sure that one could state categorically that those rules had no relation whatsoever to succession of States.

That was especially true when one considered that the term "succession of States" was understood in the draft articles to mean "the replacement of one State by another in the responsibility for the international relations of territory". The immediate effect of jointly interpreting the provisions corresponding to those two situations was to establish a system for the distribution of responsibility between two States that existed at different times, for internationally wrongful acts committed at the same time in the same territory, but in which only one of them assumed "responsibility for the international relations of territory" at the time in question.

That argument showed how the succession of States in respect of State responsibility could be approached from different perspectives. It might be more useful to approach the topic based on an analysis of State responsibility that highlighted how its essential elements were, or were not, affected by succession. That approach could also be applied, for example, to the issues of reparation and the invocation of responsibility. A more analytical and less normative focus might help to identify the relationship between the current topic and the regimes of State succession that had already been dealt with by the Commission and that could not be separated from it, as illustrated by the comments made by Mr. Reinisch regarding succession in respect of State debt or those of Mr. Nolte concerning the expropriation of foreign property. The suggestion made by the representative of Austria during the debate in the Sixth Committee of the General Assembly to change the title of the topic implied a change in its focus and methodology.

Since the change in the approach to the topic she had suggested appeared to be more consistent with a set of draft conclusions or recommendations, it could lead the Commission to change the form of its outcome. In her view, it was not necessary or even appropriate to continue following the same format used by the Commission when it had considered other aspects relating to State succession. Not only had times changed since the 1960s and 1970s, but the topic of succession of States in respect of State responsibility presented particular attributes that warranted a different approach. The final output of the Commission's work on the topic should not be seen as being diminished if it was not submitted in the form of draft articles.

With regard to the existence of a general rule of non-succession and the identification of exceptions to that rule, although she agreed in theory with the approach taken by the Special Rapporteur in draft articles 6, 7, 8 and 9, she was not entirely sure that that approach was adequately reflected in the wording of those provisions. The latter seemed to convey a permanent conditionality, as illustrated by the use of such expressions as "subject to the exceptions" or "if particular circumstances so require". While the structure of those draft articles and the use of that wording were consistent with the existence of a general rule of non-succession, they nevertheless greatly complicated the identification of such a rule.

Such conditionality was, conversely, not found at all in draft articles 10 and 11, where the principle of succession in the case of the uniting and dissolution of States was enunciated in a simpler and more conclusive manner. Apart from considerations concerning the substantive content of draft articles 6 to 9, on the one hand, and draft articles 10 and 11, on the other, the difference in the style of their drafting would certainly be noticed by readers and should perhaps be re-evaluated by the Drafting Committee.

The Special Rapporteur presented the relationship between the general rule and the exceptions to it as a model based on practice. However, it was very difficult to reach that conclusion from the analysis contained in the report. On the contrary, the report highlighted the use of international agreements and treaties to resolve the problems of State responsibility in relation to State succession, which highlighted the case-by-case nature of the solutions adopted in such situations. While treaties could not be excluded from the general concept of international State practice, which could serve to identify a customary norm, in her view the necessary conditions for identifying such a norm were not in place in the present case. Thus, it would perhaps be preferable to place more emphasis on the diversity of solutions and on the specifics of each case, following the approach taken by the Institute of International Law in its 2015 resolution on succession of States in matters of international responsibility, article 3 of which referred to the "subsidiary character" of the

guiding principles it contained, in the absence of any different solution agreed upon by the parties concerned.

The Special Rapporteur's decision to deal separately with succession in respect of the obligations and rights arising from responsibility meant that the Commission had no overview of the final effect produced by the proposed rules, making it difficult to assess the balance between those rights and obligations. Such a balance was important when deciding on possible exceptions to the general rule of non-succession. During the Commission's debate on the topic the previous week, certain policy considerations had become clear, namely the successor State's interest in not being required to assume responsibility for an internationally wrongful act that could not be attributed to it and the injured State's interest in being able to invoke responsibility and obtain reparation, even in the case of a succession of States. Those interests were closely linked and it was very difficult to determine in abstract terms which of them took precedence. If, however, the issue was analysed in terms of the succession of obligations and rights, perhaps the difficult balance between those two legitimate interests could be better understood. For that reason, the Commission should, at its seventy-first session, review the wording of the draft articles in question in order to allow for a comprehensive and parallel approach to succession in respect of both obligations and rights.

Turning to the draft articles, she noted that draft article 5 reproduced a clause that appeared in the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and the articles on nationality of natural persons in relation to the succession of States, as well as in the 2015 resolution of the Institute of International Law. It was therefore a standard clause, but its inclusion had given rise to the expression of divergent views by Commission members during the debate on the topic, echoing a much earlier debate in the Commission in 1972, at the time of its adoption on first reading of the draft articles on succession of States in respect of treaties. Notwithstanding those debates, the Commission had retained the clause in the sets of draft articles that had eventually become the 1978 and 1983 Vienna conventions. In addition, the commentaries to the two sets of draft articles did not provide sufficient reasons for retaining or excluding it, nor were conclusive reasons given by States in their comments. It could be concluded only indirectly from those commentaries that some Commission members were not willing to accept under the category of succession of States cases in which the transfer of territory took place in contravention of international law. Only one State, the United States of America, had attempted to infer any practical consequences from that precept, noting in its comments regarding the draft articles on succession of States in respect of treaties that, if the clause were retained, it should be clarified in that clause that a new State whose succession did not occur in conformity with international law would be bound by the obligations arising from succession but could not enjoy the rights it conferred. In any case, that distinction had not been retained in the commentaries.

Consequently, the meaning of draft article 5 remained inconclusive, which explained why some Commission members had suggested that the Commission's current session might be the right time to reflect on its possible deletion. Yet, despite the lack of clarity of that clause, she found no justification for excluding it from the current draft articles, since it was not the first time that the issue had arisen and since the circumstances in which succession was being considered had not changed. In addition, as the Special Rapporteur had stated in paragraph 29 of his report, articles 6 and 3, respectively, of the 1978 and 1983 Vienna conventions could perhaps be best understood as referring to the principle that no territorial acquisition resulting from the threat or use of force should be recognized as legal. From that perspective, it seemed preferable to retain draft article 5 as it currently stood. If a decision was made to delete it, it would be imperative to explain in the commentary why the Commission had changed its position in the present circumstances and had not done so, for example, in 1999, when it was adopting the draft articles on nationality of natural persons in relation to the succession of States.

She shared the views expressed by Mr. Aurescu regarding the meaning of the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* and, in particular

— contrary to what might be deduced from paragraph 29 of the report — his view that the Court had taken a position only on the accordance with international law of a unilateral declaration of independence and not on the effects that such a declaration might have on statehood and the recognition of Kosovo by third States.

Draft article 6 referred both to the attribution of an internationally wrongful act to a State and to the invocation of responsibility and claim for reparation addressed to the responsible State by the injured State. Those were two different matters, and only paragraphs 2 and 4 referred, strictly speaking, to succession. However, it was not necessary to delete the paragraphs that related directly to the attribution of an internationally wrongful act and to the invocation of responsibility. The draft article should be revised in order to clarify the components of the general rule, namely: succession did not alter the rules for the attribution of internationally wrongful acts; responsibility continued to attach to the State to which the wrongful act had been attributed and therefore the general rule of non-succession applied; and the invocation of responsibility and claim for reparation were to be addressed to the State responsible for the internationally wrongful act — in principle, the predecessor State, except in cases where an exception applied. Draft article 6 was the only one in the report that considered the issue of succession from the dual perspective of the injured State — regarding rights, or invocation of responsibility and claim for reparation — and the responsible State, regarding obligations. She wished to know whether there was any special reason for that.

With regard to draft articles 7, 8 and 9, she endorsed the Special Rapporteur's approach, which was guided by the objective of maintaining continuity with the Commission's previous work. In particular, it was noteworthy that newly independent States were dealt with in a separate draft article — although there was no reference to them with regard to succession in respect of nationality — that took into account the specificity derived from the rule on the attribution of an internationally wrongful act contained in article 10 (2) of the articles on State responsibility.

In view of the parallel structure and wording of the three draft articles, which resulted in a certain amount of repetition, consideration might be given to their revision and simplification by the Drafting Committee. In any case, it was essential to reformulate paragraph 1, which was practically identical in all three draft articles, so as to enunciate the principle of non-succession more directly, deleting the expression "subject to the exceptions". In addition, the word "secession" should be deleted from draft article 7, for the reasons expressed previously by other Commission members.

Draft articles 7, 8 and 9 incorporated certain concepts that merited further analysis, in particular "organ of a territorial unit of the predecessor that has later become an organ of the successor State" and "direct link between the act or its consequences and the territory of the successor State or States". It would be useful to evaluate whether those concepts constituted genuine exceptions to the general rule of non-succession; whether they could be considered as rules applicable to the sharing of responsibility in relation to the obligation to make reparation; or whether they should be considered only as material elements to be taken into account when negotiating an agreement between the injured State and the predecessor and successor States that would bring an end to a dispute over an invocation of responsibility and claim for reparation.

In respect of draft articles 10 and 11, the Special Rapporteur had chosen to reverse the principle of non-succession and to affirm the principle of succession in respect of the uniting of States and a presumption of succession in respect of the dissolution of a State, the latter being subject to the need for a prior agreement between the successor States. She was not fully convinced that the treaty practice referred to in the report was a sufficient basis for those draft articles; on the contrary, the draft articles seemed to point to the lack of a general rule applicable in cases of succession that involved the disappearance of the predecessor State. At the same time, she was not fully convinced that the protection of the interests of successor States was the only argument to be taken into account in deciding on succession or non-succession in such cases. On the contrary, it might be preferable to address that issue from the perspective of succession in respect of the rights of the injured State. Consequently, she would refrain from stating her position on that issue until she had

seen the Special Rapporteur's third report, which was scheduled for the seventy-first session of the Commission.

Lastly, regarding the future programme of work on the topic, she took note of the proposals contained in paragraph 191 of the report and looked forward with great interest to the analysis of succession in respect of the rights arising from responsibility. She recommended referring all the draft articles to the Drafting Committee.

Ms. Lehto said that, although States often preferred to solve issues of succession through negotiation, they would surely welcome a set of rules or principles on which they could draw in such negotiations. That had been one of the conclusions reached at the side-event organized during the first part of the Commission's current session. In view of that, it might be appropriate to include a specific reference in the draft articles to their subsidiary nature.

She endorsed the view expressed by other Commission members, including the Special Rapporteur, that the Commission's work on the topic could usefully build on the efforts already carried out by the Institute of International Law, which had recently studied the succession of States in matters of international responsibility. The Commission's work could further benefit from interaction with States, in terms of seeking their views on the proposed draft articles and requesting information concerning their practice. She agreed with Mr. Hmoud, Ms. Escobar Hernández and other Commission members who had underscored the value of States' views on the topic.

Nevertheless, as indicated by Mr. Hassouna, any expansions on, or departures from, the provisions of the Institute's 2015 resolution on State succession in matters of State responsibility should be well-founded. In that regard, it was not obvious that the decision of the Special Rapporteur to separate the transfer of obligations from the transfer of rights at the current stage should result in two sets of more or less identical draft articles. The Institute had said that its general approach in the 2015 resolution had been to find solutions that implied the existence of a State assuming the obligations stemming from an internationally wrongful act. That approach had been challenged in the Commission's debate on the topic but should not be completely discarded as a relevant consideration.

Turning to the draft articles, she said that draft article 5 should be retained for the purposes of consistency with the 1978 and 1983 Vienna conventions and the Commission's articles on nationality of natural persons in relation to the succession of States. As indicated in paragraph (2) of the commentary to article 3 of those articles: "… it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law. The Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as illegal annexation of territory." She agreed with the Special Rapporteur that, in such situations, there was no State succession.

Mr. Reinisch had pointed out that failure to apply the present provisions to an unlawful successor State could privilege such an entity by exempting it from responsibility. It could also be argued that including illegal situations within the scope of the draft articles would mean that such entities could benefit from the rights arising from the rules of State succession.

With regard to draft article 6, she agreed with Commission members who had suggested that the general rule of non-succession should be expressed more clearly in that provision. The assumption in paragraph 2 did not seem to be problematic, as in cases of continuity there was no change of sovereignty. Paragraph 3 was not problematic either, given that it seemed to capture the situation referred to in paragraph (3) of the commentary to article 11 of the Commission's articles on State responsibility, which indicated that: "… if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it." In such a case, the successor State would incur responsibility for its own conduct. Paragraph 4 did not seem, strictly speaking, to be necessary, and the phrase "as provided in the following draft articles" could perhaps be located elsewhere in the provision. The draft article as a whole would benefit from some streamlining. Several

drafting suggestions intended to make the text clearer had already been made and could be discussed by the Drafting Committee.

Draft article 7 (2) and (3) addressed the particular circumstances in which obligations arising from an internationally wrongful act could pass to the successor State, even though the predecessor State continued to exist. She agreed with those Commission members who had drawn attention to the somewhat vague nature of the phrase "particular circumstances". It was also unclear why paragraph 3 referred only to a direct link between the act or its consequences and the territory of the successor State or States and not also to the population. That was one aspect in which the proposed draft articles differed from the 2015 resolution of the Institute of International Law. It would be helpful to clarify the concept of a direct link by specifying whether it meant that the territory was a core element of the wrongful act. The same comments were valid for draft article 9.

Paragraph 4 of draft article 7, which provided for a special case of continuity, corresponded to article 10 (2) of the articles on State responsibility. She could support the inclusion of that paragraph, as well as that of draft article 8 on newly independent States, even though they overlapped slightly. She agreed with the Special Rapporteur that there was a reason to distinguish between cases of dissolution and unification, in which the original State disappeared, and cases of separation of parts of a State, through secession, in which there was a continuator State.

Although the Institute of International Law had found it quite logical that obligations stemming from the commission of an internationally wrongful act should pass to the successor State when two or more States united and that the relevant rights and obligations also passed to the successor State when a State was incorporated into another existing State, such rules might be too categorical given the diversity and complexity of situations of State succession. She noted that the Special Rapporteur had proposed a default rule in case the States concerned, including the injured State, demurred.

The wording of draft article 11 (1) was obscure. In particular, it was not clear how the phrase "subject to an agreement" should be construed. The inclusion in the second paragraph of the requirement that States should negotiate in good faith was important. The Drafting Committee might wish to consider what other factors should be taken into account.

She was in favour of referring all the draft articles to the Drafting Committee.

Mr. Cissé said that the topic should be approached cautiously on account of its complexity. Like the first report, the second report said nothing about succession of States on the African continent, although the latter had been and still was a veritable laboratory in that respect. The recently created State of South Sudan should have been listed among the examples of State practice underpinning draft article 8 on newly independent States. The two much older examples of Morocco and Namibia, while of relevance to the study, did not confirm the existence of exceptions to the rule of non-succession.

Draft articles 6, 7 and 8 prompted many questions. With regard to draft article 6, he wondered how a general rule could be posited in the absence of well-established State practice, especially when the Special Rapporteur acknowledged the diversity of that practice. Since there was nothing to codify without State practice, the only avenue left was that of the progressive development of *lex ferenda* which should not, however, call into question well-settled principles of international law such as non-succession in respect of State responsibility. Paragraph 3 of that draft article was incomprehensible. How could the mere fact that an internationally wrongful act was continuous render the successor State responsible for it? Could an internationally wrongful act which lasted for some time always be attributed to a successor State, even when it was neither the author nor the source of such an act? What sort of breach of an international obligation did the Special Rapporteur have in mind? How could a successor State be bound by an obligation which had arisen before it existed as a State? Should that obligation not be borne exclusively by the predecessor State? If paragraph 3 were to set forth an exception to the general rule of non-succession, it would have to be recast more clearly, above all if the draft articles were to be turned into an international treaty or convention, or clarified in the commentary.

Paragraph 4 referred to "the injured State" without further explanation. If that signified the successor State, the paragraph should be more explicit. Did the expression "injured subject" refer to a State (since a State was a subject of international law), or did it refer to an individual, or to natural or legal persons under private or public law who had suffered injury from an internationally wrongful act and who was claiming reparation? If that were so, provision should be made for procedural safeguards enabling injured subjects to file a claim for compensation with the competent national or international courts. The phrase "also or solely" was even more confusing. Perhaps what the Special Rapporteur wanted to say was that the injured State or subject could claim compensation for the damage done by an internationally wrongful act either from the predecessor State or from the successor State or States.

The wording of draft article 7 was vague. It would be more correct in legal parlance to speak of the separation of a State's territory rather than the separation of parts of a State. Paragraph 1 referred to secession without explaining what kind of secession was meant. Would secession obtained unconstitutionally, and therefore unlawfully, come within the ambit of the draft articles? Paragraphs 2 and 3 referred to undefined "particular circumstances" which would nonetheless place the successor State under obligations. Such an exception was perplexing and the Special Rapporteur's tentative explanations were far from convincing. It was inappropriate for the Commission to consider the conduct of an insurrectional movement. Careful perusal of paragraph 4 would seem to indicate that the Commission gave priority to the role of such movements in the establishment of new States and lent them some sort of legality. That paragraph should simply be deleted.

Unlike paragraph 1 of draft article 8, which was unproblematic as it followed the general rule of non-succession, the substance of paragraph 2 was difficult to grasp, since the report linked the act, its consequences, the territory of the successor State, the former dependent territory and the enjoyment of substantive autonomy, which were deemed to be particular circumstances justifying an exception to succession. In fact, that paragraph, far from connoting an exception to succession, to some extent confirmed the rule of non-succession, because the obligations stemming from an internationally wrongful act of the predecessor State could not be transferred to the successor State unless the latter agreed. It could therefore be presumed that, without any such agreement, there would be no automatic transfer of obligations from the predecessor to the successor State. As it stood, paragraph 3 gave the impression that it was the conduct of the liberation movement that was at issue in the establishment of a new State. The role of international law, however, was simply to take note that a liberation movement had established a new State and draw all the legal consequences therefrom. If paragraph 3 remained unchanged, the Special Rapporteur must draw a conclusion from it.

He recommended referral of all the draft articles to the Drafting Committee.

Mr. Ouazzani Chahdi said that the topic of succession of States in respect of State responsibility should be approached with caution owing to its complexity and political dimension. International law in that area should foster legal certainty and stable international relations.

He agreed with the general approach proposed in chapter I, section B, and with using a combination of deductive and inductive methods when applying the rules on State responsibility for internationally wrongful acts to State succession. It would, however, be wise to define the notions used in that context, such as "attribution of the internationally wrongful act", as had been done in the Commission's articles on responsibility of States for internationally wrongful acts. He also concurred with the Special Rapporteur's analysis of the Commission's earlier work on legality of succession and therefore supported draft article 5, which replicated a provision contained in the 1978 and 1983 Vienna conventions and the articles on nationality of natural persons in relation to the succession of States, and which was also reproduced virtually word for word in article 2 (2) of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility.

Like a number of other members, he wondered why the Special Rapporteur intended to deal with obligations and rights separately in two different reports. While the Special

Rapporteur was correct in holding that the rarity of cases of State succession should not prevent the Commission from formulating some general or special rules on the matter, the examples of succession which he supplied in the report seemed to refute the general rule of non-succession which should be guiding the Commission's work. At all events, the successor State always remained free to accept the obligations flowing from the internationally wrongful acts of the predecessor State.

The notion of a newly independent State should be clarified on the basis of the definition provided in the aforementioned resolution of the Institute of International Law, according to which a newly independent State was "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". In general, that term applied to States which had not disappeared during the colonial period, but which had retained their international legal personality as protectorates under international law. It could likewise be applied to States which re-emerged from the break-up, dissolution or unification of States.

An answer to the question of whether the category of newly independent States could be applied in the case of international protectorates might be found in the book *La succession d'États à Madagascar* by the late Daniel Bardonnet. Other examples existed in Africa. Conversely, State succession did not apply to Morocco which had remained a sovereign State throughout the protectorate period, as the International Court of Justice had noted in the *Case concerning rights of nationals of the United States of America in Morocco*.

The draft articles contained terms or passages which required some elucidation and which must therefore be reviewed by the Drafting Committee. One such term was "the injured State or subject" in draft article 6 (2). The wording and content of paragraph 4 of the same article likewise called for re-examination. The phrase "if particular circumstances so require" in draft articles 7, 8 and 9 should be either revised or deleted by the Drafting Committee.

He had no objection to the referral of all the draft articles to the Drafting Committee.

Mr. Šturma (Special Rapporteur) said that he welcomed the prevailing opinion in the Commission that the topic of succession of States in respect of State responsibility was one it should deal with, but the question remained of how that should be done in order to achieve a balanced and generally acceptable outcome. Subsequent reports would provide answers to a number of the questions raised during the rich and very helpful debate. Some members had expressed doubts about the suitability of the topic for codification, or even the feasibility of that task. He, along with a number of other members, considered that it was a topic of general international law which was suitable for both codification and progressive development. He had tried in his study to shed light on some lacunae in the Commission's earlier codification work in the fields of State responsibility and succession of States.

The purpose of his second report was to explain the possible impact of succession of States on general, secondary rules of State responsibility. His aim was not to invent new norms, but rather to follow well-established rules and employ the terms used in both those areas of international law. He wished to draw attention to paragraph (3) of the commentary to article 11 of the articles on responsibility of States for internationally wrongful acts, which stated that: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it." That passage should be interpreted as an invitation to the Commission to take up the topic, not to exclude it from its work.

Nothing in the articles on State responsibility suggested that responsibility for an internationally wrongful act, or, to be more precise, the legal consequences of such a wrongful act, vanished because of State succession. The fact that those articles did not include a "without prejudice" clause, such as that contained in article 73 of the Vienna Convention on the Law of Treaties, might imply that obligations arising from State responsibility were in principle applicable notwithstanding succession of States. That was

the starting point which informed the general and special rules proposed in the second report. The proposal made by two members to change the title of the topic to "State responsibility problems in cases of succession of States" merited further consideration.

While some members had been in general agreement with the methodology which he envisaged, others had considered that there was not enough relevant State practice to justify pursuing the topic. Although he had acknowledged in his report that such State practice as was available was diverse, context-specific and sensitive, he believed that his approach was consistent with the Commission's mandate progressively to develop international law. Indeed, it was his intention to combine both progressive development and codification of international law.

Some members had been of the opinion that the report relied too heavily on policy considerations, or that successor States might assume obligations for political reasons rather than *opinio juris* in favour of a general succession rule. He personally failed to see a distinction between *lex ferenda*, *lex desiderata* and policy considerations. Like Mr. Nolte, he tended towards the view that State practice was also influenced by policy considerations. State practice was not necessarily good and policy was not necessarily dubious. In fact, the two were interrelated and policy considerations were also an inherent part of law-making.

A number of members had addressed the question of which sources could or could not be relied on. Three members had taken the view that reliance on existing treaties might be misleading, owing to their narrowness of scope and the fact that they bound only the parties to them. While of course the *pacta tertiis* rule applied and treaties resulted from specific political negotiations, they were nevertheless binding agreements between States and as such they were a form of State practice.

Admittedly there was little case law with regard to some infrequent kinds of succession, and it was true that many issues were settled out of court. However, there was a slow but growing trend to refer cases to the European Court of Human Rights. He disagreed with the view that judgments in human rights cases were not relevant to the topic and that they concerned civil liability and not international responsibility. The European Convention on Human Rights was an international treaty and the European Court of Human Rights was an international, albeit regional, court. He failed to see how a finding by the Court that the Convention had been violated would not concern the international responsibility of a State. The Court was not a third or fourth instance of a national judicial system, but the international judicial body competent for supervising the compliance of States with their obligations under the Convention in respect of both individuals and other States. That was also true of other courts such as the Inter-American Court of Human Rights, although its case law might be of greater relevance to ongoing violations of the American Convention on Human Rights than to succession of States, as all instances of succession in Latin America had taken place before the adoption of the Convention.

The second report had relied fairly heavily on scholarly writings because they, along with case law, were recognized as a subsidiary means of identifying rules of law. In the past, the Commission had made frequent use of them in situations where State practice had been diverse and context-specific, because they tended to provide a more general view of the matter. As for the texts of the Institute of International Law, he noted that opinions had been divided on the extent to which the Commission should draw on them. He personally considered that the Commission should broadly follow the line taken by the Institute, but depart from it where necessary. It was not unusual for the Commission to deal with a topic which had been considered earlier by a private body, as the interest shown by several bodies in that topic would seem to confirm its relevance. However, as he shared Mr. Huang's concern that excessive reliance on the Institute's work might undermine the Commission's standing as the main entity responsible for the progressive development and codification of international law, he wished to draw attention to some features of his approach to the topic which differed from that taken in the Institute's 2015 resolution. His study relied more on agreements and unilateral declarations and sought to analyse the transfer of rights and obligations separately. It placed greater emphasis on the effects of State succession on State responsibility, which might possibly lead to a change in the title of the topic. Its aim was also to draft new articles on forms of responsibility such as

reparation. While the outcome might not be entirely different, it should be better in some respects.

Members had expressed many and varied views on the question of a general rule. While Mr. Park and Mr. Petrič thought it important to identify a general rule applicable to the topic, Ms. Galvão Teles had pointed out that it might not be useful or possible to do so. Mr. Hassouna was unsure whether a rule of non-succession existed, given the exceptions identified in the report. According to Mr. Zagaynov, there might be no general rule of either non-succession or succession. However, several members had asserted that any general rule should be a rule of non-succession, with provision for exceptions. He agreed with Mr. Park that it was important to identify categories of State succession and shared Mr. Nguyen's view that a realistic and flexible approach was needed and that the principle of non-succession could not be applied too rigidly. He also agreed with Mr. Petrič and Ms. Oral that it was important to study the possible criteria for exceptions and that the Commission should be especially cautious in finding exceptions to the rule of non-succession.

Many members, frequently referring to paragraph 16 of his report, had expressed the view that the Commission's work should not replace a general theory of non-succession with a general theory of succession, even inadvertently. According to them, some of his proposals espoused a general presumption of succession, especially in cases where the predecessor State no longer existed. Mr. Hassouna had suggested that such an approach called the very existence of a general rule of non-succession into question.

While he agreed with the need for both a general rule, or rules, and for exceptions for individual categories of succession, a general rule was arguably more important for those who stressed non-succession as the starting point. His position, as reflected in draft article 6 (1) was that, for the purpose of the creation of responsibility of a State on the basis of an internationally wrongful act by that State, non-succession was an absolute rule. It was clear that both the action or omission and the international obligation breached must refer to that State only. However, neither the report nor the draft articles asserted that a successor State should become the responsible State on the basis of a wrongful act that it had not committed. All the legal consequences of the wrongful act, including any circumstances precluding wrongfulness, the obligation of cessation and possible countermeasures, remained in principle applicable to and the concern of the responsible State, which was the predecessor State. The successor State might be responsible for its own wrongful acts, in the context of a continuing breach or the attribution of acts of an insurrectional or other movement. The provisions concerning those cases were rules on responsibility and attribution, rather than succession, but it was useful to recall them in the context of the current topic.

The real exceptions to the rule of non-succession had a limited but important purpose relating to certain consequences of an internationally wrongful act that did not disappear even if the predecessor State ceased to exist. Similarly, as territory, population, property and debts did not disappear in the event of succession, the exceptions also reflected the fact that certain obligations that would be the subject of future draft articles, such as reparation, compensation or guarantees of non-repetition, might in principle be claimed from the predecessor State, but that that State might or might not be in a position to make such forms of reparation. In exceptional cases — the grounds for which, in addition to agreement, devolution of organs, territorial links, and unjust enrichment or other equitable considerations, could be discussed — the successor State would be in a position to make appropriate reparation. That State should not, however, be held responsible, much less blamed, for acts it had not committed, but rather commended for not leaving the injured State or persons without reparation.

Several members had highlighted the need for consistency with the Commission's previous work in terms of both substance and terminology. In that respect, most had referred to the articles on State responsibility, using the terms "responsibility", "reparation" and "damage" in conformity with those articles. He agreed both with them and with those members who had suggested not using the controversial term "secession", which had been included in draft article 7 in parentheses and could easily be deleted.

There had been some debate on the basic distinction between cases in which the predecessor State continued to exist and cases in which it no longer existed. While Mr. Park and Mr. Grossman Guiloff supported such a distinction, Sir Michael Wood and Mr. Reinisch had expressed disagreement with it on the grounds that it was essentially political and could lead to unjust and inequitable results. In his view, it was not necessarily so. Although policy considerations could not be entirely excluded, the distinction had been drawn on the basis of real differences and was consistent with recognized categories of succession. Whether it might lead to unjust results was a legitimate question; however, the results depended not on the categorization itself but on the specific content of rules and exceptions in individual draft articles. They were, or should be, drafted so as to exclude unjust and inequitable results as far as possible.

Several members had said that analysing the obligations and claims arising from responsibility separately might lead to duplication of work and other methodological difficulties. The separation he had made in his report served mainly for the purpose of analysis and did not exclude a possible merger of draft articles, if thought useful; however, as Mr. Murase had observed, such a separation also echoed the structure of the articles on State responsibility, particularly parts one and two. Mr. Murase had also rightly suggested that the draft articles should make reference to the direct link between an internationally wrongful act and the population, not just the territory, especially in relation to newly independent States, which would be done mainly in the third report.

A number of members were of the view that the subsidiary role of the proposed draft articles must be underlined. He fully agreed with them. Indeed, the content of his first report and draft articles 3 and 4 clearly, though implicitly, confirmed the importance of agreements and unilateral declarations. He had therefore not proposed a special provision on subsidiarity, preferring to clarify the issue in the commentary, but a new provision could be drafted if the majority considered it necessary.

The issue of agreements related to the comments made by Mr. Murase and Mr. Huang, with whom he agreed, to the effect that the injured subject must also consent to any undertaking of responsibility by the successor State. Draft article 3 (3), on agreements other than devolution agreements, would cover that point, following on from the analysis of different kinds of agreements and the *pacta tertiis* principle in his first report, but he accepted that the concept might be better expressed and the rights of an injured third party better protected in an express provision. He also agreed with Mr. Hassouna that all other categories of succession should be defined in draft article 2.

Concerning the variety of practice, case law and other examples adduced in his reports, he agreed that more non-European practice was needed and that references to controversial cases would need to be handled with care. However, given the nature of the topic, they could not be excluded entirely. He expressed appreciation to Mr. Nguyen, Mr. Huang and Mr. Zagaynov for correcting certain inaccuracies concerning the unification of Viet Nam and to Mr. Aurescu for providing examples of case law on Transnistria. He fully supported the suggestion of requesting States to furnish State practice and case law on the topic and asking the Secretariat to prepare a study, focusing in particular on relevant agreements.

He generally agreed with Mr. Murphy's suggestion that consideration should be given to restructuring certain draft articles, although how to tackle draft article 6 would require further reflection. He also agreed that draft article 5, on legality of succession, should be placed immediately after draft articles 1 and 2.

Draft article 5 was consistent with the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and the articles on nationality of natural persons in relation to the succession of States, and enjoyed wide support. Mr. Nguyen had also pointed out that succession to responsibility should be subject to *jus cogens*. Although he agreed, he considered the concept of conformity with international law to be broader and to include *jus cogens* in any case.

Mr. Aurescu, Mr. Petrič and Ms. Escobar Hernández had supported draft article 5 but queried the philosophical issue of neutrality mentioned in the report, suggesting that

succession of States was either lawful or unlawful, with no third option possible. Such a proposition had a certain logic, and he agreed with their arguments in respect of internal legal orders, where even difficult cases could always be resolved on the basis of legal principles by seeking optimization, rather than selecting a single rule to invalidate or derogate from all others, particularly in the context of the case law of supreme or constitutional courts. International law, however, was a less developed legal system, in which many issues had historically been governed not by law but by politics, or "freedom of action". Modern international law covered more and more areas, thanks to progressive development and codification; nevertheless, it was not clear if it fully covered certain facts, such as the creation of States, revolutions and secession. International law included general principles as well as specific rules, but lack of compulsory jurisdiction prevented the International Court of Justice from playing the role of world constitutional court. In its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court itself had seemed to recognize the limits of international law.

Draft article 5 in no way sought to privilege an unlawful successor State by exempting it from responsibility, as suggested by Mr. Reinisch. Instead, the aim was to positively delineate the material scope of the draft articles. Placing draft article 5 after draft articles 1 and 2 would serve that purpose, allowing it to cover not only the draft articles that dealt with the possible transfer of obligations but also those relating to rights arising from responsibility. For good reason, draft article 5 tackled neither the consequences of illegality, nor the potential law applicable in such situations. As argued in his report, it could be said that, in cases of unlawfulness, there would be no State succession at all. Determining the rules applicable to such illegal situations fell outside the scope of the present topic. He agreed with Mr. Jalloh and Mr. Hmoud that unlawfulness of territorial changes was a separate matter from the unlawfulness of succession itself, which was in turn separate from the possible consequences in terms of responsibility. In line with the Commission's consistent practice in the area of State succession, keeping draft article 5 as proposed would emphasize the importance of conformity with international law in that area, leaving aside the difficult issues of the consequences of illegality and determining the applicable law.

Some members had agreed in principle with paragraph 1 of draft article 6. Others had not opposed it but considered it unclear. Mr. Aurescu and Sir Michael Wood had said that it was not sufficiently clear from the wording of draft article 6 that it concerned a general rule, exceptions to which were provided in subsequent articles. The issue was covered both in his report and in paragraph 4 of draft article 6, but he agreed that the wording could be clearer. In the light of his earlier explanation, he hoped that Mr. Petrič and Mr. Hassouna could accept the reference to attribution, although he agreed that it was a separate problem from succession.

Several members had proposed new wording for draft article 6. Although he preferred his original text, which was more general, the proposal made by Mr. Murase, Mr. Jalloh and Mr. Grossman Guiloff had merit, while Mr. Murphy's proposal, supported by Ms. Oral, to make paragraph 1 a stand-alone provision as the only section referring to all cases of State succession effectively captured his intention. Ms. Escobar Hernández's suggestion also deserved consideration.

Mr. Zagaynov's proposal to delete the reference to injured subjects other than States was not purely a matter of drafting but a conceptual issue meriting in-depth consideration. The reference to article 33 (1) of the articles on State responsibility was correct but related only to the applicability of part two and perhaps part three thereof. As the commentary to those articles confirmed, part one, on the origins of State responsibility, was general. The rules, in particular rules of attribution, could and, as the practice of human rights courts and investment arbitration tribunals clearly showed, did apply to breaches of international obligations of States owed to other actors, including international organizations and individuals. In addition, his third report, the aim of which would be to analyse the possible transfer of rights, would certainly include such cases, in addition to claims under diplomatic protection. He therefore preferred to keep the concept broader, at least for the present.

He approached paragraph 2 of draft article 6 in the same light. The wording had been supported by Mr. Reinisch and Mr. Rajput, while Ms. Oral and Mr. Hmoud had

proposed redrafting it. He would prefer to send it to the Drafting Committee in its original form, although that did not preclude possible changes.

Paragraph 3 of draft article 6 had provoked various comments, ranging from agreement to rejection. Some members objected to the provision because it seemed to give different grounds for attribution. Mr. Petrič, Ms. Oral and Mr. Grossman Guiloff had asked for clarification, which was fully justified. He had used a different, "without prejudice" formulation precisely because he was aware that attributing responsibility on the basis of continuing breaches differed from the exceptions set out in paragraph 4 and further developed in subsequent draft articles.

Mr. Petrič and Ms. Oral had suggested deleting the phrase "if it is bound by the obligation" as they found it superfluous or unclear. While it might be superfluous, his aim had been to make it clear that the obligation must also be binding on the successor State. That much was obvious in the case of customary international law, but the obligation might originate in a treaty origin and be subject to succession in respect of treaties, which was a matter separate from succession in respect of responsibility.

Some members had suggested clarifications to paragraph 4 of draft article 6. The reference to reparation in that paragraph had not been intended to render other rules of State responsibility irrelevant: they remained applicable to the predecessor State. In the case of the successor State, the limited and exceptional transfer of certain obligations warranted a cautious approach. Other members had objected to the provision. He refuted those objections, as the provision did not discard the general rule but merely served to introduce the limited exceptions that followed.

Mr. Rajput had referred to boundary treaties. While not covered in the section of the report covering draft article 6, both boundary treaties and other territorial regimes were relevant to the law of State succession. The concept of such territorial regimes had been introduced by the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)* and later confirmed by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Although others might question the relevance of the 1978 Vienna Convention, there was no doubt about the customary nature of the rule reflected in article 11 thereof on the continuity of boundary and other territorial regimes, such as the bilateral Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System. Its relevance to succession in respect of responsibility lay in the fact that the successor State might be in a position to offer a guarantee of non-repetition only if it was still bound by the treaty obligation breached. It might also be seen as a supportive argument, *per analogiam*, for drawing a distinction between succession with respect to responsibility *per se*, which neither the International Law Institute nor his report suggested, and succession to the rights and obligations arising from internationally wrongful acts.

He agreed that the term "secession" should be deleted from the title of draft article 7. He also agreed with Mr. Murase's suggestion that reference should be made to the substantive autonomy of State organs that became organs of the successor State. Mr. Rajput, Mr. Petrič and Mr. Huang had pointed out that the expression "organ of a territorial unit" was unclear. He agreed with Mr. Petrič that the explanation in the report could usefully be included in the commentary.

Many members had commented that the expression "if particular circumstances so require" in paragraphs 2 and 3 of draft article 7 required clarification. Some had proposed its deletion, which he would not object to. Several members had suggested examining the specific criteria more closely. The suggestion of adding the category of unjust enrichment was also worth considering. As he had explained, he was not in favour of deleting paragraph 4 of draft article 7, as some members had proposed, but he was open to drafting changes.

Mr. Hassouna's suggestion that the reference to agreements in draft article 8 (2) should also be added to draft articles 7 and 9 was a good one, but it should be considered in the light of the possible merger of those three draft articles and with reference to draft article 3. While several members had expressed support for draft article 8, Mr. Reinisch, Mr. Huang and Ms. Galvão Teles had proposed its deletion on the grounds that it was

unnecessary or obsolete. He was keen to see all categories of succession maintained, at least for the purpose of analysis and consistency, but as a matter of drafting he supported Mr. Murphy's proposal to merge the content of draft articles 7, 8 and 9 into a single article so as to avoid unnecessary repetition and resolve many drafting issues. Certain inconsistencies in the French and Spanish versions of those three draft articles would also need to be eliminated. The suggestion to change the words "national liberation or other movement" to "insurrectional or other movement" in paragraph 3 of draft article 8 could serve as the basis for a single paragraph or draft article referring both to separation of part of territory and to newly independent States.

Many of the issues raised with respect to draft articles 7 and 8 were also relevant to draft article 9, and some members had made helpful drafting suggestions; however, his preference to merge the three draft articles would partly resolve those issues. He agreed that the term "an organ of a territorial unit" should be clarified, either in the commentary or by inserting an additional definition in draft article 2. He had intended the phrase to refer to States that were part of a federation, as had been the case of the Czech and Slovak republics in Czechoslovakia or the constituent republics of the former Yugoslavia, or to regions having a substantial degree of autonomy and self-government, such as Crete before its incorporation into Greece.

Ms. Oral had raised the interesting question of whether the notion of a territorial link created some form of obligation *in rem*, but the proposals set out in draft articles 7 to 9 did not go that far. Their starting point remained the rule of non-succession and responsibility of the predecessor State, if it continued to exist. Unlike an *in rem* obligation, which would entail an automatic transfer of obligation to the successor State, the proposed territorial link was only one factor justifying, as a matter of exception, the transfer of certain obligations to the successor. A stronger form of the link, such as in the case of violation of obligations under boundary or other territorial regimes, might resemble an *in rem* obligation; however, a territorial link might simply involve a case where either the object or the victims of a wrongful act were located in an area that was no longer on the territory of the predecessor State. Consequently, it might exclude or limit that State's capacity to make restitution or guarantee non-repetition.

Draft articles 10 and 11, which dealt with situations in which the predecessor State had ceased to exist, had prompted numerous critical comments. Mr. Hassouna and Mr. Grossman Guiloff supported draft article 10, on the uniting of States, but many members had expressed doubt, pointing out that it proposed a general rule of succession, rather than non-succession, essentially for policy reasons. Those members had also stressed that consent of the successor State was imperative in assuming obligations. Some members had expressed the view that draft article 10 was *de lege ferenda*. While they might be partly right, it was in fact a rebuttable presumption, rather than a reversed rule of automatic succession replacing that of non-succession in all circumstances.

Mr. Reinisch and Mr. Nolte had asserted that the examples he had provided were irrelevant and mostly concerned expropriation, which was not an internationally wrongful act *per se*. Others had also raised the issue of expropriation. There was a clear distinction to be drawn between lawful expropriation, which, under General Assembly resolution 1803 (XVII) rather than the more vague terms of the Charter of Economic Rights and Duties of States, was the right of any sovereign State, subject to payment of appropriate compensation, and an internationally wrongful act; however, even expropriation might constitute a wrongful act if the expropriating State did not respect the conditions set in international law, and such cases should not be completely disregarded.

Concerning the case of German reunification, he agreed with the detailed and generally convincing analysis provided by Mr. Nolte, who had also made a helpful proposal to reword draft article 10. He hoped that such an important change would also satisfy those who had stressed the role of agreement.

Draft article 11, on the dissolution of States, was both important and controversial. It enjoyed the support of Mr. Hassouna and Mr. Grossman Guiloff, but Mr. Reinisch and Mr. Petrič opposed it as currently drafted. Sir Michael Wood had expressed the view that it was a very difficult draft article that would require careful consideration and attention to the

views of States. As with draft article 10, some members had invoked the *lex ferenda* argument. Mr. Park, Mr. Reinisch, Mr. Grossman Guiloff and Mr. Ruda Santolaria considered the successor State's consent imperative in the assumption of obligations, but Mr. Grossman Guiloff had added that some mention of how obligations might be transferred in the absence of any agreement should be retained and further clarified.

He had not intended draft article 11 to be the sole provision dealing with dissolution of States but rather as a general, introductory provision to be complemented later by another draft article setting out criteria — similar to the provisions in draft articles 7 to 9 — and additional rules on how to apportion obligations arising from an internationally wrongful act by a predecessor State that had ceased to exist. Given that the current, unqualified wording had created many doubts and misunderstandings, an additional paragraph was needed after paragraph 1 to include such criteria, some of which already appeared in the second sentence of paragraph 2. Paragraph 2 would be renumbered accordingly and could perhaps be redrafted as suggested by Mr. Murase. At the same time, it might not include full details of how obligations would be apportioned, because the issues of the distribution of such obligations, the plurality of States and shared responsibility would require additional analysis in future reports.

Sir Michael Wood, Mr. Murphy, Mr. Petrič and Ms. Escobar Hernández had expressed agreement with the programme of work he had proposed. Mr. Park had rightly observed that the focus of his third report — on the transfer of rights or claims from an injured predecessor — might need careful consideration to avoid duplication of work. According to Mr. Hassouna, the question of how to consider the role of international organizations should be examined, and consideration of the impact of circumstances precluding wrongfulness would be important.

Mr. Zagaynov had expressed concern that the pace of work might be too fast, but the schedule proposed was not unusual for the Commission. In view of the Commission's workload, however, it was realistic to assume that the first reading of the draft articles might not be completed before 2021. Mr. Hassouna and Ms. Oral had said that consideration should be given to drafting model clauses to be used as a basis for negotiating agreements on succession. Although he agreed, the draft articles in their current form, having a subsidiary character, could also serve that purpose.

A large majority of members had expressed support for referring draft articles 5 to 11 to the Drafting Committee, but Mr. Hmoud was in favour of referring only draft articles 6 to 11. Mr. Reinisch and Mr. Huang had said that draft articles 10 and 11 should not be referred to the Drafting Committee, while Mr. Rajput had suggested only referring certain draft articles or paragraphs of draft articles to the Drafting Committee, an approach which was unacceptable because it would destroy the balance between rules and exceptions that he had tried to establish and would lead to the sort of unjust results that Mr. Reinisch and Mr. Rajput himself had warned against. He therefore supported the majority view and recommended referring all the draft articles proposed in his second report to the Drafting Committee.

Mr. Hmoud said that, in his statement on the Special Rapporteur's second report, he had indicated that he would be in favour of referring draft articles 10 and 11 to the Drafting Committee on the understanding that their content would be substantively altered. However, the Special Rapporteur had not made clear in his summing-up of the debate that he intended to change the underlying rule. In the view of the vast majority of Commission members, the general rule was that obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State. Draft articles 10 and 11 represented a departure from that cardinal rule, which was based on article 2 of the Commission's articles on State responsibility.

Mr. Nolte said that he had supported Mr. Hmoud's proposal to give the Drafting Committee wide discretion to alter the content of draft article 10 in particular. His own proposal for draft article 10, which the Special Rapporteur had accepted, would bring about a substantive change of direction. He personally found the Special Rapporteur's explanation satisfactory. In any case, the standard language used to refer draft provisions to

the Drafting Committee should be sufficient to satisfy both the Special Rapporteur and Mr. Hmoud.

The Chair said he took it that the Commission wished to refer draft articles 5 to 11 to the Drafting Committee, taking into account the comments, observations and proposals made during the debate.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of succession of States in respect of State responsibility was composed of Mr. Argüello Gómez, Mr. Aurescu, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Sir Michael Wood and Mr. Zagaynov, together with Mr. Šturma (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

Draft report of the Commission on the work of its seventieth session

The Chair said that, in line with its past practice, the Commission would adopt its report paragraph by paragraph. The members would need to focus on substantive issues in order to ensure the most efficient use of their time.

Chapter VII. Provisional application of treaties (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

The Chair invited the Commission to consider chapter VII of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.920.

A Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

B Consideration of the topic at the present session

Paragraph 5

Mr. Park, referring to footnote 4, said that he wished to know whether the decision to reproduce the text of the draft model clauses proposed by the Special Rapporteur but not that of draft guidelines 5 *bis* and 8 *bis*, which the Special Rapporteur had also proposed, was in line with the Commission's usual practice. His preference would be to reproduce the text of draft guidelines 5 *bis* and 8 *bis* in that footnote as well.

Mr. Murphy said that, as far as he was aware, if a proposal had been debated, referred to the Drafting Committee, reworked by the Drafting Committee and subsequently adopted with the commentaries, the Commission did not usually reproduce the original text in a footnote in its report, as to do so might cause confusion. The draft model clauses had been included in footnote 4 because, although the Commission had not acted on them, it might nevertheless be useful for the Sixth Committee to see them in the report.

Mr. Park said that the Commission's practice in that regard seemed a little inconsistent. For example, in its 2017 report to the General Assembly (A/72/10), chapter VI, on protection of the atmosphere, had not included any footnotes in which the draft guidelines had been reproduced, whereas chapter VII, on immunity of State officials from foreign criminal jurisdiction, had included a footnote in which draft article 7, as originally proposed, had been reproduced. The draft provisions for both of those topics had been adopted with the commentaries.

Mr. Murphy said that, in the Commission's 2017 report, the original proposal for draft article 7 on immunity of State officials from foreign criminal jurisdiction had been included in a footnote in chapter VII in order to provide the Sixth Committee with additional information relevant to the debate that had taken place. With regard to chapter

VII of the draft report under consideration, however, the debate had not been reflected, as the Commission had moved beyond it, and the Commission's usual practice in such circumstances was not to reproduce the text of original proposals. However, Mr. Park had been correct to note that the Commission's practice in that regard had not always been consistent, and the Commission should strive to improve the consistency of its working methods.

Mr. Saboia said that the reproduction of the draft model clauses in footnote 4 made chapter VII easier to follow.

Sir Michael Wood said that the footnote in question might distract the Sixth Committee from the draft guidelines that had been adopted.

Mr. Tladi asked whether the Commission would at some point adopt the draft model clauses.

The Chair said that the Special Rapporteur's proposal for the draft model clauses had been reproduced in a footnote in order to alert the General Assembly to the fact that the Commission had not yet acted on that proposal. The draft model clauses had not been substantively discussed or referred to any working group. They had been left in the hands of the Special Rapporteur, who might wish to bring them to the Commission's attention in a subsequent report.

Mr. Murphy said that it was explained in footnote 16 of the addendum to chapter VII of the draft report (A/CN.4/L.920/Add.1) that the Commission intended to resume its consideration of the draft model clauses proposed by the Special Rapporteur.

Mr. Gómez-Robledo (Special Rapporteur) said that the draft model clauses were also mentioned in paragraph 7 of the document currently under consideration.

Sir Michael Wood said that it might be clearer for the Sixth Committee if footnote 4 were moved from paragraph 5 to paragraph 7.

The Chair said that, in his view, it would make more sense to retain the current text of footnote 4 and to add a new footnote to paragraph 7 containing a cross reference to footnote 4. However, that was a decision for the Special Rapporteur.

Mr. Gómez-Robledo said that he agreed with Sir Michael Wood that it would be clearer to move the text of current footnote 4 to a new footnote to be added to paragraph 7.

Mr. Rajput said that it would also be helpful to include a cross reference.

The Chair said he took it that the Commission wished to move the text of footnote 4 to a new footnote, which would be added to paragraph 7, and to replace it with a cross reference to that new footnote.

It was so decided.

Paragraph 5 was adopted on that understanding.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

Mr. Murphy said that, in order to avoid ambiguity, the footnote marker for the new footnote to be added to paragraph 7 should be inserted after the words "a set of draft model clauses".

Paragraph 7, as supplemented with a footnote, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted, subject to their completion by the Secretariat.

C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session

Title of section C and heading 1

Mr. Park proposed inserting the words "on first reading" after "adopted by the Commission" in the title of section C.

Mr. Gómez-Robledo said that he had no strong opinion on the matter. He was not sure what the Committee's usual practice was in that regard.

Mr. Tladi said that, in his view, the title of section C and heading 1 should both be simplified. It was already stated in paragraph 11 that the text of the draft guidelines had been adopted on first reading. As far as he could recall, the Commission did not usually specify in the title of the relevant section of its report that its draft provisions on a given topic had been "adopted by the Commission" at a particular session. He was also not sure about the formulation "draft guidelines constituting the draft Guide to Provisional Application of Treaties".

Mr. Nolte said that the Commission should entrust the Secretariat with applying a uniform style for titles and headings throughout the draft report. His instinct was that the Commission should use the word "draft", as the guidelines had not yet been adopted on second reading.

The Chair said that the title of section C and heading 1 of document A/CN.4/L.920 would be left in abeyance pending a review of the Commission's relevant practice.

The meeting rose at 1.10 p.m.

Provisional

For participants only

21 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3436th meeting
Held at the Palais des Nations, Geneva, on Thursday, 26 July 2018, at 10 a.m.

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Organization of the work of the session (*continued*)

Peremptory norms of general international law (*jus cogens*) (*continued*)

Interim report of the Drafting Committee

Protection of the environment in relation to armed conflicts (*continued*)

Report of the Drafting Committee

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that the Commission would first receive the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts".

Mr. Tladi, noting that it was the responsibility of the Bureau to discuss issues and provide guidance to the Chair, said that very few Bureau meetings had been held and that many changes had been made to the schedule of meetings. In that connection, he pointed out that the Drafting Committee on the topic of "Peremptory norms of general international law (*jus cogens*)" had completed its work two weeks earlier and that the presentation of its report on that topic had been scheduled for 20 July, moved to 23 July and then no more had been heard of it. It would make sense and be appropriate to consider the report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" before its report on the topic "Protection of the environment in relation to armed conflicts". Those issues could have been addressed if a Bureau meeting had been held to discuss them. He could not therefore agree to the Chair's proposal to hear the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts" before its report on the topic "Peremptory norms of general international law (*jus cogens*)".

The Chair said that the Commission had not considered the report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" on 20 or 23 July, as scheduled, because the Special Rapporteur on that topic had not been available at that juncture. The reason why the report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts" had been scheduled for the current meeting was that the Drafting Committee had completed its work on that topic and had adopted three texts, whereas the Drafting Committee still needed more time the following year to complete its consideration of the draft conclusions on *jus cogens* which had been submitted during the current year. Other considerations which had to be taken into account included the availability of other special rapporteurs and the fact that the Drafting Committee was not submitting any texts on *jus cogens* for adoption by a plenary sitting. He had therefore decided to schedule the presentation of the lengthy report of the Drafting Committee on *jus cogens* for the afternoon of 30 July before or after the introduction of Special Rapporteur's sixth report on immunity of State officials from foreign criminal jurisdiction.

Mr. Tladi said that none of the reasons given by the Chair had been convincing. His absence could not be the reason why the report on *jus cogens* had not been taken up by the Commission on 20 July, since on 19 July he had heard the Chair state that the report of the Drafting Committee on *jus cogens* would be presented on 20 July, even though the Special Rapporteur would not be present. The Chair was inventing a new practice by saying that, when draft texts were still outstanding, there was no need to receive a Drafting Committee report. It was not the first time that the Drafting Committee had been unable to complete a full set of draft texts, and the Commission's practice had always been to consider Drafting Committee reports in the order in which they had been completed. He could not therefore agree with the Chair's proposal.

The Chair said that he had concluded that the presentation of the Drafting Committee's report on *jus cogens* would absorb an inordinate amount of the precious time which the Commission needed to complete its programme of work for the current year. He had not heard any other members complain about adhering to the programme. The Secretariat could be asked to provide information about past practice. He invited members to comment.

Mr. Gómez-Robledo said that the easiest solution would be to hear both Drafting Committee reports at the current meeting and to postpone the adoption of the chapter of the draft report concerning provisional application of treaties until later meetings.

The Chair said that debates had been scheduled to take account of the absence of the Special Rapporteur on provisional application of treaties the following week and to allow enough time for the Special Rapporteur on immunity of State officials from foreign

criminal jurisdiction to introduce her report and for the Commission to begin to discuss it. While he had no objection to the proposal made by Mr. Gómez-Robledo, it would obviously have repercussions on the time available for debating the other chapters of the draft report.

Mr. Nolte said that Mr. Tladi's concerns merited discussion at the following meeting of the Bureau. As the order in which topics were discussed was a practical issue, he was in favour of proceeding in the manner proposed by the Chair.

The Chair said that he was prepared to call an immediate meeting of the enlarged Bureau to discuss the problem at length, in order to satisfy those who considered that it was impossible to proceed without such a meeting.

Ms. Escobar Hernández said that she realized that the Chair and the Bureau had made a great effort to facilitate consideration of all the topics on the agenda in a timely manner. Therefore, although she fully understood Mr. Tladi's wish to have the report of the Drafting Committee on the topic for which he was Special Rapporteur presented at the current session, she supported the proposal made by the Chair, even though it might result in the time allotted to the consideration of the topic for which she was Special Rapporteur, namely immunity of State officials from foreign criminal jurisdiction, being impinged on.

Sir Michael Wood, supported by **Mr. Hmoud**, said that the Commission should adopt the helpful suggestion made by Mr. Gómez-Robledo.

Mr. Jalloh (Chair of the Drafting Committee) said that both reports were ready and he would be happy to fall in with the aforementioned suggestion.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

Interim report of the Drafting Committee

The Chair invited the Chair of the Drafting Committee to present the interim report of the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)".

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on peremptory norms of general international law (*jus cogens*) had held three meetings in New York during the first part of the current session, at which it had adopted draft conclusions 8 and 9 concerning, respectively, evidence of acceptance and recognition, and subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). He had presented an oral interim report on those two draft conclusions at the 3402nd meeting, on 14 May 2018 (A/CN.4/SR.3402). Draft conclusions 1 and 3 had been adopted at the sixty-eighth session, and draft conclusions 2 and 4 to 7 at the sixty-ninth session.

During the second part of the current session, the Drafting Committee had held a total of four meetings, on 9, 10, 11 and 12 July 2018, at which the 14 new draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1) had been examined. The Commission had referred those draft conclusions to the Drafting Committee on 9 July 2018, together with the comments and drafting suggestions made in the plenary debate, on the understanding that the Drafting Committee would also consider the Special Rapporteur's proposed reformulation of draft conclusions 22 and 23 as a "without a prejudice clause". In the short time available, the Drafting Committee had been able to consider and adopt only draft conclusions 10 to 14 and would therefore take up the consideration of draft conclusions 15 to 23 at the Commission's seventy-first session. The draft conclusions for that topic would remain with the Drafting Committee until it had adopted a full set for submission to the Commission for approval.

As far as the approach to the topic was concerned, in response to the prevailing view which had emerged in the plenary debate, the Drafting Committee had sought as far as possible to align the text of the draft conclusions proposed by the Special Rapporteur with that of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. However, given the particular nature of the draft conclusions, the Drafting Committee

had sometimes diverged from the structure and language of the Vienna Convention, where appropriate, in order to allow for the specificities of the topic.

Although, during the plenary debate, it had been suggested that several of the draft conclusions proposed by the Special Rapporteur should refer to international organizations, the Drafting Committee had decided to consider the implications of including international organizations in its work on the topic at a later stage, once it had agreed on a set of draft conclusions as a whole. That method was in keeping with the Special Rapporteur's suggestion in his first report (A/CN.4/693) that a fluid approach should be employed for the adoption of draft conclusions on the topic.

Turning more specifically to draft conclusions 10 to 14, he first drew the Commission's attention to draft conclusion 10 concerning the legal consequences of a conflict between a treaty and a peremptory norm of general international law (*jus cogens*). Paragraph 1 confirmed that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law (*jus cogens*). While the Drafting Committee had adopted the first sentence of the paragraph as proposed by the Special Rapporteur, it had decided to adjust his proposal for the second sentence to follow more closely article 69 (1) of the Vienna Convention, which stated that "the provisions of a void treaty have no legal force". The phrase "have no legal force" was broader than the formulation "does not create any rights or obligations", which had been suggested by the Special Rapporteur. As the commentary would make clear, the use of that language served solely to define what was meant by "void" in the first sentence. It did not signify that certain effects or consequences occurred before the fulfilment of the procedural requirements for establishing that a treaty was, in fact, void, which were set out in draft conclusion 14. Indeed, as the Special Rapporteur had noted during the debate on the draft conclusion, the consequences of a treaty being void in accordance with draft conclusion 10 were equally dependent on the procedural requirements set forth in draft conclusion 14.

Paragraph 2 of draft conclusion 10 covered the situation where an existing treaty became void and terminated owing to the emergence of a new peremptory norm of general international law (*jus cogens*), in consequence whereof the parties to the treaty were released from any obligation further to perform the treaty. While the Drafting Committee had agreed with the substance of the initial wording proposed by the Special Rapporteur, it had decided to align the text with the relevant provisions of the Vienna Convention. The first sentence followed verbatim article 64 of the Vienna Convention, while the second sentence replicated article 71 (2) (a) of the Vienna Convention.

The Drafting Committee had decided to hold paragraph 3 of draft conclusion 10, as proposed by the Special Rapporteur, in abeyance until a later stage, as it intended to craft a separate draft conclusion which would provide for a general rule requiring that a treaty should be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*). Such a rule would also apply to other sources of law and obligations.

The title of draft conclusion 10 was "Invalidity and termination of treaties in conflict with a peremptory norm of general international law (*jus cogens*)". The title proposed by the Special Rapporteur had been modified to take account of the fact that the draft conclusion covered not only invalidity but also the termination of a treaty in conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee had discussed whether to replace the term "invalidity" with "void" to reflect the body of the draft conclusion, but after comparing corresponding terminology in other languages, it had decided not to draw a substantive distinction between the terms "void" and "invalid", which were used interchangeably. The term "void" was employed in the text and the term "invalidity" in the title of draft conclusion 10, and in subsequent draft conclusions, where applicable.

Draft conclusion 11 concerned the possible separability of treaty provisions which were in conflict with a peremptory norm of general international law (*jus cogens*). It drew a distinction between the status of a treaty which, at the time of its conclusion, conflicted with a peremptory norm and the status of a treaty which became void owing to the emergence of a new peremptory norm. The two scenarios were addressed in two separate

paragraphs. Paragraph 1 confirmed the general rule that a treaty was void in whole and no separation of the provisions of the treaty was permitted. The Special Rapporteur's formulation of that paragraph had been modified to track more closely the Vienna Convention and to make it consistent with draft conclusion 10 by replacing the term "invalid" with "void". The first part of the paragraph drew on article 53 of the Vienna Convention, which stated that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". The second phrase followed the formulation in article 44 (5) of the Vienna Convention, which explicitly stated that in cases falling under article 53 of the Convention "no separation of the provisions of the treaty is permitted".

Paragraph 2 set forth the exception to the general rule stated in paragraph 1. The chapeau was based on the original proposal of the Special Rapporteur, except that the term "invalid" had been replaced with "void". Paragraph 2 provided that a treaty which became void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminated in whole, unless the cumulative conditions in subparagraphs (a) to (c) were met. The original wording proposed by the Special Rapporteur for subparagraphs (a) and (b) had been adjusted to echo that of article 44 (3) (a) and (b) of the Vienna Convention. The requirement in subparagraph (a) was that provisions in conflict with a peremptory norm of general international law (*jus cogens*) had to be separable from the remainder of the treaty "with regard" to their application. Subparagraph (b) had been revised and refined by adding the phrase "it appears from the treaty or is otherwise established that acceptance of the said provisions". The original reference to "do not constitute an essential basis" had been replaced with the words "was not an essential basis". The phrase "of any party to be bound by the treaty as a whole" had been inserted at the end.

A proposal had been made to replace the term "unjust" in subparagraph (c) with the phrase "harmful to the fundamental values of the international community" in order to distinguish a conflict with a peremptory norm of general international law (*jus cogens*) from other grounds of invalidity or termination of a treaty. However, the Drafting Committee had agreed that the term "unjust" did not relate to the underlying ground for invalidity but to the balance of rights and obligations created by the treaty, which should not be disturbed by separating only certain provisions from the treaty.

The title of draft conclusion 11 was "Separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)". The Drafting Committee had decided to replace the term "severability", proposed by the Special Rapporteur, with "separability" for the sake of consistency with the terminology of the Vienna Convention.

Draft conclusion 12 concerned the consequences for the parties to a treaty of the invalidity and termination of that treaty if it conflicted with a peremptory norm of general international law (*jus cogens*). Paragraph 1 dealt with the scenario referred to in paragraph 1 of draft conclusion 10, namely where a treaty was void because it conflicted with a peremptory norm of general international law (*jus cogens*) when it was concluded. The parties to the treaty in question were under two legal obligations namely to: (a) eliminate as far as possible the consequences of any act performed in reliance on any conflicting provision of that treaty; and (b) to bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

The wording of paragraph 1 was based on the proposal by the Special Rapporteur but it had been modified in order to bring it into line with article 71 (1) (a) and (b) of the Vienna Convention, as suggested during the plenary debate. The Drafting Committee had restructured the paragraph by replacing the term "invalid" with "void" in the chapeau, inserting the qualifying phrase "as far as possible", which was deemed to be a particularly important clarification, into subparagraph (a) and adding subparagraph (b). The Drafting Committee had also considered proposals for simplifying the formulation of the chapeau, but had settled for the current drafting.

Paragraph 2 dealt with the termination of an existing treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*). It followed the basic rule which was aimed at preserving rights, obligations or legal situations created

through the execution of the treaty prior to its termination, provided that those rights, obligations or situations might thereafter be maintained only to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law (*jus cogens*). While the first part of the paragraph was based on the formulation proposed by the Special Rapporteur, the second part qualifying it tracked article 71 (2) (b) of the Vienna Convention.

The Drafting Committee had considered a number of proposals for the title of draft conclusion 12 and had settled on "Consequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (*jus cogens*)". The draft conclusion contemplated in general terms the consequences of invalid and terminated treaties. The words "invalidity and termination" reflected the two scenarios envisaged therein. More specific drafting had been rejected in recognition of the fact that draft conclusion 12 did not address all the possible consequences, including, for example, those mentioned in draft conclusion 10, namely that the provisions of a void treaty had no legal force and the parties to a treaty that became void were released from any further obligation to perform the treaty. The Drafting Committee had again been faced with the conundrum of the interchangeable use of the words "void" and "invalidity". To avoid confusion, while the title referred to "invalidity", the text in paragraph 1 used "void".

Draft conclusion 13 concerned the effect of reservations to treaties on peremptory norms of general international law (*jus cogens*). In accordance with a suggestion made in the plenary debate, the Drafting Committee had aligned the text of the draft conclusion, as proposed by the Special Rapporteur, with that found in the Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011.

Paragraph 1 confirmed that a reservation to a treaty provision which reflected a peremptory norm of general international law (*jus cogens*) did not affect the binding nature of that norm, which continued to apply as such. The Drafting Committee thought it useful to add the clarifying phrase "as such", found in guideline 4.4.2 of the Guide to Practice, in order to expressly confirm the continuing applicability of the peremptory norm in question outside the treaty context. The Drafting Committee had considered replacing the term "binding" with "peremptory" to emphasize the special nature of peremptory norms of general international norms (*jus cogens*), but it had ultimately decided that the phrase "as such" captured that special nature. However, the phrase "between the reserving State or organization and other States or international organizations", found in the aforementioned guideline had not been transposed to draft conclusion 13, since peremptory norms of general international law (*jus cogens*) were binding in the relations between all States (and international organizations).

Paragraph 2 confirmed that a reservation could not exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*). The Drafting Committee had decided to adopt the paragraph with the formulation proposed by the Special Rapporteur, which replicated virtually word for word paragraph 2 of guideline 4.4.3 of the Guide to Practice. The phrase "in a manner" was to be understood as referring to the legal effect of the treaty and not to exclusion or modification owing to conflict with a peremptory norm of general international law (*jus cogens*). Furthermore, the term "treaty" also encompassed the legal effect entailed by the phrase "certain provisions of the treaty", as explained in the commentary to guideline 4.4.3 of the Guide to Practice.

A proposal had been made to add a new paragraph 3 to draft conclusion 13, based on guideline 3.1.5.3 of the Guide to Practice, which would stipulate that the fact that a treaty provision reflected a peremptory norm of general international law (*jus cogens*) did not in itself constitute an obstacle to the formulation of a reservation to other provisions of that treaty. The Drafting Committee agreed that the issue was implicitly covered by paragraph 1 of draft conclusion 13 and would be best addressed in the commentary thereto.

The title of draft conclusion 13 was "Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)". The version proposed by the Special Rapporteur had been modified to reflect the title of guideline 4.4.3 of the Guide to Practice with the addition of the phrase "of reservations to treaties", which had been

considered a useful specification since the scope of the draft conclusions was different to that of the Guide to Practice.

Draft conclusion 14 dealt with the procedural requirements applicable when a State invoked a conflict with a peremptory norm of general international law as grounds for the invalidation or termination of a rule of international law. During discussion in the Drafting Committee, it had been emphasized that the consequences of invoking a conflict with a peremptory norm of general international law were far-reaching and could not follow automatically from the claim that such a conflict existed. As the consequences of such a conflict could affect the stability of treaty relations, a unilateral determination of the existence of such a conflict by either the invoking or the objecting State must be avoided. A view had been expressed that it might be better not to include a draft conclusion on procedure at all, partly to avoid weakening the relevant procedures in the 1969 Vienna Convention.

Nonetheless, the prevailing view within the Drafting Committee had been that the question of the applicable procedure was key to the Commission's work on the topic. The relevant provisions of the 1969 Vienna Convention constituted a package: on the one hand, States could invoke a conflict with a peremptory norm of general international law (*jus cogens*) as grounds for a treaty to be invalidated or terminated; on the other, the Convention included procedural safeguards to preserve the integrity of the treaty. In the end, the Drafting Committee had decided to include a draft conclusion on the procedure for invocation and to solicit the comments of States on the appropriateness and content of the provision.

The Drafting Committee had adopted draft conclusion 14 on the basis of proposals inspired by the procedural requirements set out in articles 65 to 67 of the 1969 Vienna Convention. In its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had noted that those articles reflected customary international law. Nonetheless, in the light of the non-binding nature of the draft conclusions, the Drafting Committee had replaced the compulsory formulation "shall", used in the Convention, with recommendatory wording such as "is to" or "are to", which was more in line with the purpose of the topic.

Paragraph 1 of draft conclusion 14 transposed the notification requirement found in article 65 (1) of the 1969 Vienna Convention to the claim of a possible conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee had discussed limiting the paragraph to the termination and invalidity of treaties. Another possibility considered had been to refer to all rules of international law but to explicitly single out treaties, in recognition of the fact that the most likely invocation of invalidity or termination on account of a conflict with a peremptory norm of general international law might be in the context of treaty-based rules. The Drafting Committee had also considered making a specific reference to binding decisions of international organizations. It had settled on an even broader reference to "a rule of international law", without specifying the source of the rule, on the understanding that the commentary would clarify that such a reference covered treaties and other sources of international law, including unilateral acts and binding decisions of international organizations.

Having adopted a broader scope, the Drafting Committee had opted for the wording "States concerned", which was also used in subsequent paragraphs, instead of "States" or "parties", which were references typically more specific to treaties. Concerns had been expressed with regard to the practical implementation of such a broad approach. While the notification of other parties to a treaty could be effected through the depositary for the treaty in question, notification of the invalidity or termination of other rules of international law, potentially to the entire international community of States, posed practical difficulties, particularly for smaller States. To address such concerns, it had been suggested that such notification could be made through the Secretary-General of the United Nations.

The second sentence of draft conclusion 14 (1) combined the procedural requirements set out in the second sentence of article 65 (1) of the 1969 Vienna Convention with that in article 67 (1) thereof. The Drafting Committee had taken the view that, while

of international law and a peremptory norm was claimed, written notification would provide greater legal certainty.

Paragraph 2 of draft conclusion 14 was based on article 65 (2) of the 1969 Vienna Convention. Following notification by a State claiming the invalidity or termination of a rule of international law as a result of a conflict with a peremptory norm of general international law, other States were to be given a reasonable period within which to reply. In line with that article, the Drafting Committee had considered three months to constitute a reasonable minimum period.

Paragraph 3 of draft conclusion 14 set out the next step in the envisaged procedure, by which, if an objection were lodged under paragraph 2, then the States concerned should seek to resolve the dispute by any of the means indicated in Article 33 of the Charter of the United Nations, which included the possibility of submitting the dispute to arbitration, as in the Special Rapporteur's original proposed draft conclusion and in article 66 (a) of the 1969 Vienna Convention. However, a view had also been expressed that the *ad hoc* nature of arbitration might make it an unsuitable forum for resolving disputes involving peremptory norms of general international law. Furthermore, the possibility of submitting disputes to arbitration under article 66 (a) of the 1969 Vienna Convention was subject to a 12-month time limit, which could result in different limitations being applicable to parties and non-parties to the Convention.

Paragraph 4 of draft conclusion 14, which was inspired by article 66 (a) of the 1969 Vienna Convention, laid down the next step of the suggested procedure. It would be triggered when resort to means of settlement under paragraph 3 did not result in a solution within a period of 12 months. In such circumstances, the objecting State or States could offer to submit the matter to the International Court of Justice, and the invoking State would not be able to carry out the measure it had proposed until the dispute was resolved. The Drafting Committee had taken the view that linking the resolution of disputes to the offer of judicial settlement and acceptance of the jurisdiction of the Court would demonstrate the good-faith basis of the claim and corresponding objection. The formulation of the paragraph was intended to resolve the problem that not all States were subject to the compulsory jurisdiction of the Court. Nonetheless, the Drafting Committee acknowledged that a claim of invalidity or termination because of a conflict with a peremptory norm of general international law did not *per se* establish the jurisdiction of the Court or of any other international court or dispute settlement procedure.

The Drafting Committee had also been confronted with the problem of potential conflicts with procedures already established in the 1969 Vienna Convention. To address such concerns, a "without prejudice" clause had been inserted as paragraph 5 of draft conclusion 14 in order to preserve the procedural requirements set forth in the Vienna Convention, the relevant rules concerning the jurisdiction of the Court, and other applicable dispute settlement provisions agreed by the States concerned. The third element was intended to cover other dispute settlement agreements applicable between the States concerned, such as optional clauses or multilateral treaties establishing relevant procedures.

The Drafting Committee had agreed that the placement of draft conclusion 14 within the set of draft conclusions would need to be finalized at a later stage, partly because its scope was no longer limited to treaty rules.

Mr. Nolte, referring to draft conclusion 14, said that he wished to place on record that it was his understanding that the wording "is to" and "are to" had been chosen by the Drafting Committee in preference to "shall" precisely because those terms were ambiguous, leaving some latitude for them to be interpreted as more than simply recommendatory, particularly if the draft conclusion was intended to reflect the view of the International Court of Justice on the customary nature of articles 65 to 67 of the 1969 Vienna Convention.

Protection of the environment in relation to armed conflicts (agenda item 8) (*continued*) (A/CN.4/720)

Report of the Drafting Committee (A/CN.4/L.911)

Mr. Jalloh (Chair of the Drafting Committee), introducing the report of the Drafting

that the Drafting Committee had devoted three meetings to its consideration of the topic, from 17 to 19 July. It had examined the three draft principles initially proposed by the Special Rapporteur in her first report (A/CN.4/720), together with a number of reformulations she had proposed to the Drafting Committee in response to suggestions made and concerns raised during the Commission's debate. The Drafting Committee had provisionally adopted three draft principles during the present session, the titles and texts of which were contained in document A/CN.4/L.911.

A number of suggestions for additional draft principles made during the Commission's debate had also been considered. The Drafting Committee had first discussed whether it would be appropriate to adopt a separate draft principle on the applicability of the law of occupation to international organizations. After a thorough debate, it had been decided that the issue would be best addressed in the commentary, given that, although international organizations might exercise functions similar to occupying States in certain circumstances, the international administration of a territory could not easily be equated to military occupation and there was little practice on which to build. The Drafting Committee had agreed with the Special Rapporteur's proposal to use the term "Occupying Power" in the draft principles, thereby leaving the door open to possible future developments.

In the light of a proposal that had been made during the Commission's discussion, obtaining much support, the Drafting Committee had also debated the question of whether to include a provision indicating that the draft principles already adopted applied *mutatis mutandis* to situations of occupation. The Drafting Committee had ultimately considered that the relationship with other draft principles should be explained in a general commentary to Part Four of the set as a whole.

Draft principle 19 focused on the general obligations of an Occupying Power. As the Special Rapporteur had indicated in her first report, the law of occupation was based primarily on the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 and complemented by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), which referred only indirectly to the protection of the environment, along with certain provisions of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) and customary international humanitarian law. The obligations of an Occupying Power must nevertheless be interpreted within the contemporary legal context, which included rules pertaining to environmental concerns as an essential interest of all States. The purpose of paragraph 1 of draft article 19 was to set forth the general obligation of an Occupying Power. The draft principle derived also from the general thrust of article 43 of the Hague Regulations, which imposed upon the Occupying Power the obligation to take care of the welfare of the population of an occupied territory. The Drafting Committee had proceeded on the basis of the revised version of draft principle 19 (1) that the Special Rapporteur had presented in the statement introducing her first report. The Drafting Committee had considered it appropriate to use the term "Occupying Power", rather than "occupying State", as it was a term of art used in the Fourth Geneva Convention and Additional Protocol I, in addition to allowing flexibility with regard to the role of international organizations.

As the law of occupation was a subset of the law of armed conflict, draft principle 19 should be read in the context of draft principle 9. Both draft principles referred to the obligation to protect and respect the environment in accordance with applicable international law, although draft principle 19 did so in the more specific context of occupation. The term "applicable international law" referred in particular to the law of armed conflict, but also to international environmental law and international human rights law.

The Drafting Committee had discussed the meaning of the term "environmental considerations" in draft principle 19 (1). General agreement had been expressed with the Special Rapporteur's view that the expression was context-dependent and evolving and would need further clarification in the commentary. Further to the concerns expressed by

territorial State was entitled to exercise sovereign rights, which was unnecessary in the text of the draft principle and could be explained in the commentary.

During the Commission's debate on draft principle 19, a number of members had suggested the adoption of an additional provision to address human rights relevant to environmental protection, and specific proposals had been made in that regard. Paragraph 2 of draft principle 19, as contained in document A/CN.4/L.911, was a new paragraph that had been introduced in response to those comments. Its purpose was to indicate that significant harm to the environment of an occupied territory could have adverse consequences on the population of the territory in question, particularly with respect to the enjoyment of certain human rights. The Drafting Committee had debated the necessity of adopting a paragraph on that specific issue, given that paragraph 1 of draft principle 19 already required the Occupying Power to respect and protect the environment of the occupied territory in accordance with applicable international law, which included international human rights law. After an extensive debate, it had been decided that an additional paragraph was appropriate in view of the importance of the matter. The Drafting Committee had agreed that the commentary would clarify the need to read paragraph 2 in the context of paragraph 1 and would explain that, while paragraph 1 covered the obligation of the Occupying Power in general terms, paragraph 2 referred to a specific element of that obligation.

The Drafting Committee had also discussed whether to refer to international human rights in general or to highlight specific rights, such as the right to health. Given the general reference in paragraph 1 of draft article 19, it had been decided to refer specifically to the health and well-being of the population of the occupied territory in paragraph 2. The commentary could explain that the provision also covered a number of other human rights, such as the right to life or the right to food. The words "that is likely to prejudice" were intended to provide a basic link; the concept of "the health and well-being of the population" would also be clarified in the commentary. The phrase "shall take appropriate measures to prevent significant harm" reflected wording used in the Commission's previous work, particularly the articles on prevention of transboundary harm from hazardous activities, but it was understood that the word "significant" did not represent an additional threshold, as the harm in question was already qualified by the last part of the sentence.

Paragraph 3 of draft principle 19 was intended to limit the extent to which the Occupying Power could modify the law and institutions of the occupied territory concerning the protection of the environment; it corresponded to draft principle 19 (2) in the Special Rapporteur's first report. During the Commission's debate, some members had suggested that the obligation of an Occupying Power to respect the national laws of the occupied territory "unless absolutely prevented", despite being based on article 43 of the Hague Regulations, did not reflect the latitude afforded by the law of armed conflict for Occupying Powers to legislate when necessary for the maintenance of public order and civil life and for the benefit of the local population. The Special Rapporteur had accordingly made a new proposal within the Drafting Committee, omitting reference to that stringent exception. A number of members of the Drafting Committee had pointed out that the term "legislation", used in the original proposal, could have different meanings in different legal systems and might be understood in a restrictive way. The Drafting Committee had therefore decided to use the more generic word "law" to indicate clearly that the obligation was not limited to certain categories of domestic legislation. The need to refer specifically to institutions, which could be covered by the term "law", had also been discussed. Further to the explanations provided by the Special Rapporteur, the Drafting Committee had considered it appropriate to retain an explicit reference to institutions, as the Geneva Conventions of 1949 contained provisions specifically addressing the maintenance of the institutions of the occupied territory, and institutional collapse was a common feature of conflict situations.

The Drafting Committee had agreed with the Special Rapporteur that mention should also be made of the limitations imposed by international law on the ability of an Occupying Power to modify laws and institutions of the occupied territory concerning protection of the environment, as indicated by the phrase "within the limits provided by the

The purpose of draft principle 20 was to set forth the obligations of an Occupying Power as administrator and usufructuary with respect to the sustainable use of natural resources. It applied "[t]o the extent that the Occupying Power [was] permitted to administer and use the natural resources in an occupied territory". Members of the Drafting Committee had suggested that such wording would allow for an explanation in the commentary of the various types of limits on the Occupying Power and the law from which they derived. It was also reflected by the use of the verb "permitted". The Drafting Committee had decided to use the phrase "administer and use" in light of the terminology used in article 55 of the Hague Regulations.

The Drafting Committee had debated including a provision that such administration and use must be for the benefit of the population of the occupied territory. While a number of members of the Committee had considered such a mention necessary, others had pointed out that the law of armed conflict allowed for other possibilities, in particular the use of natural resources for occupation forces and administration personnel. It had therefore been decided to cover all possible situations by indicating that such administration and use of natural resources in the occupied territory could be "for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict".

As the Special Rapporteur had indicated, the right of usufruct from which the provision derived must be interpreted with due consideration for the well-established concept of sustainability and in the context of the sustainable use of natural resources. It was the Drafting Committee's understanding that the term "sustainable use" did not preclude the use of non-renewable natural resources and that a clarification to that effect would be included in the commentary. In addition, the notion of minimizing environmental harm directly reflected draft principle 2. The Drafting Committee had therefore not considered it appropriate to alter the word "minimize" to "prevent".

Draft principle 21, which had enjoyed general support during the Commission's debate, was based on the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Drafting Committee had decided to refine it and to indicate more firmly that an Occupying Power was required to exercise due diligence. It had also changed the words "significant damage" to "significant harm", to ensure consistency with other draft principles and with the Commission's previous work on other topics. As the territory occupied might in some cases extend to only part of the territory of a State, several members of the Committee had considered that the phrase "to the environment of another State or to areas beyond national jurisdiction" could be interpreted as excluding the territory of other parts of the same State. It had therefore been decided to indicate that the territorial scope of the provision should cover "areas beyond the occupied territory". The view had been expressed, however, that the expression "areas beyond national jurisdiction" should have been retained, as it was commonly used in international instruments.

The draft principles were presented for information only; they would be submitted for provisional adoption by the Commission at a later stage, once the commentaries had been prepared.

The Chair said that it was his understanding that the Special Rapporteur would prepare commentaries to draft principles 19, 20 and 21 for the following session of the Commission.

He took it that the Commission wished to take note of the report of the Drafting Committee on protection of the environment in relation to armed conflicts contained in document A/CN.4/L.911.

It was so decided.

The meeting rose at 11.30 a.m. to enable the enlarged Bureau to meet.